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Nos. 15728 and 15731

In the United States Court of Appeals
for the Ninth Circuit

BERNARD BLOCH, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE ORDERS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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BERNARD BLOCH, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITIONS FOR REVIEW OF THE ORDERS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Tax Court did not render an opinion.

JURISDICTION

This proceeding involves federal income taxes for the taxable years 1947, 1948, 1952 and 1953. On November 6, 1956, the Commissioner sent to taxpayer by registered mail a notice of deficiency for the years 1952 and 1953 stating a deficiency in the amount of \$4,907.17 plus penalties totaling \$1,811.56. On February 11, 1957, taxpayer filed a petition for redetermination of that deficiency under the provisions of Section 272 (a)(1) of the Internal Revenue Code of 1939¹ and

¹ Section 272(a)(1) Internal Revenue Code of 1939 is applicable because Section 7851(a)(6), Internal Revenue Code of 1954 (Appendix, *infra*) continues the notice of deficiency and petition to the Tax Court procedures of Section 272(a)(1) with respect to taxes imposed by the 1939 Code with the exception of treating timely mailing as timely filing whenever Section 7502 of the 1954 Code applies. Section 6213(a), Internal Revenue Code of 1954 is substantially the same as Section 272(a)(1).

Section 7502(a) of the Internal Revenue Code of 1954. On January 8, 1957, the Commissioner sent to taxpayer by registered mail a notice of deficiency for the taxable years 1947 and 1948 stating a deficiency in the amount of \$8,695.65 plus penalties of \$4,347.83. On April 12, 1957, taxpayer filed a petition for redetermination of that deficiency under the provisions of Section 272 (a)(1) of the Internal Revenue Code of 1939 and Section 7502(a) of the Internal Revenue Code of 1954. The order of the Tax Court dismissing the first petition was entered on May 3, 1957. The petition for rehearing was denied on May 24, 1957. The order of the Tax Court dismissing the second petition was entered on July 3, 1957. The case is brought to this Court on timely petitions for review filed on July 30, 1957, and September 3, 1957. Jurisdiction is conferred on this Court by Section 7482, Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether filing a petition for redetermination is deemed timely, under Section 272(a)(1), Internal Revenue Code of 1939 and Section 7502(a), Internal Revenue Code of 1954, when the petition is mailed but the United States postmark date on the envelope containing the petition is not within the 90-day period prescribed by Section 272(a)(1) for filing a petition for redetermination.

STATUTES INVOLVED

The pertinent provisions of the statutes involved may be found in the Appendix, *infra*.

STATEMENT

This appeal involves two consolidated cases. The basic factual pattern is that the Commissioner sent a

notice of deficiency by registered mail to the taxpayer who was then incarcerated in the Federal Correctional Institution, Terminal Island, San Pedro, California. The petition for redetermination in each instance was received by the Tax Court more than 90 days after the date the notice of deficiency was mailed. The Tax Court dismissed each petition for lack of jurisdiction.

The notice of deficiency pertaining to the years 1952 and 1953 was sent by registered mail to taxpayer on November 6, 1956, addressed to taxpayer at his then correct address of Terminal Island, Correctional Institute, San Pedro, California. Taxpayer's petition for redetermination (hereinafter referred to as first petition) was received and filed by the Tax Court on February 11, 1957, the 97th day after the notice of deficiency was mailed. The 90th day, February 4, 1957, was neither a Saturday, Sunday nor legal holiday. The United States postmark on the envelope containing the first petition was illegible. The letter transmitting the first petition was dated February 5, 1957, the 91st day after the notice of deficiency was mailed. The warden, Mr. P. G. Smith, stated in a letter dated June 5, 1957, and addressed to the Clerk of the Tax Court that the first petition had been placed in the hands of taxpayer's case worker on Friday, February 1, 1957, but it was not possible to get the cover letter dictated and typed until Tuesday, February 5, 1957.

The notice of deficiency pertaining to the taxable years 1947 and 1948 was sent to taxpayer by registered mail on January 8, 1957, addressed to taxpayer at his then correct address of Federal Correctional Institution, Terminal Island, California. Taxpayer's petition for redetermination (hereinafter referred to as second

petition) was mailed in San Pedro, California. The postmark date on the envelope containing the second petition was April 9, 1957, the 91st day after the mailing of the notice of deficiency. The 90th day, April 8, 1957, was neither a Saturday, Sunday nor legal holiday. The petition was received and filed by the Tax Court on April 12, 1957, the 94th day after the mailing of the notice of deficiency. Mr. T. R. Kildall, Chief Classification & Parole, in a letter dated June 19, 1957, to the Clerk of the Tax Court stated that taxpayer's file indicated that five copies of a paper titled "Petition" were forwarded to the Tax Court on March 25, 1957, and five copies of a petition were forwarded to the Clerk on April 8, 1957.

In each instance, the Commissioner moved to dismiss on the ground that the Tax Court lacked jurisdiction since the petitions for redetermination had not been filed within the prescribed 90-day period nor did a postmark indicate that either petition had been mailed within the prescribed 90-day period. In each instance, the Tax Court granted the Commissioner's motion.

SUMMARY OF ARGUMENT

In order for the Tax Court to acquire jurisdiction a petition for redetermination must be filed with that court within 90 days after a notice of deficiency is mailed. To file a petition with the Tax Court means actual delivery of the petition to the Tax Court. The first petition in this case was delivered to the Tax Court on the 97th day after the notice of deficiency was mailed and the second petition was delivered on the 94th day. Therefore, the petitions were not filed within the prescribed 90-day period.

The undisputed facts show that Section 7502(a) is inapplicable. That section specifically provides that it shall apply only if the postmarked date stamped on the envelope containing the petition falls on or before the prescribed date for filing. The postmark on the envelope containing the first petition was illegible, however, the letter transmitting that petition was dated February 5, 1957, the 91st day after the notice of deficiency was mailed. The postmark date on the envelope containing the second petition was April 9, 1957, the 91st day after the notice of deficiency was mailed. In each instance, the dates are one day after the expiration of the prescribed 90-day period for filing.

The presumption of delivery in the ordinary course of the mail cannot operate here to aid taxpayer because the facts show that the petition could not have been actually delivered within the 90-day period.

Taxpayer's argument concerning procedure and the constitutional objections raised are without merit and it is clear that taxpayer received the notices of deficiency in ample time for filing the petition for redetermination within the prescribed 90 days. Accordingly, the Tax Court correctly dismissed the petition for redetermination for lack of jurisdiction.

ARGUMENT

The Tax Court Correctly Dismissed the Petitions for Redetermination for Lack of Jurisdiction Because the Petitions Were Not Timely Filed in Accordance with the Provisions of Section 272(a)(1) of the 1939 Code as Modified by Section 7502(a) of the 1954 Code

When a deficiency is asserted by the Commissioner, taxpayer may seek a redetermination by filing a petition with the Tax Court. Section 272(a)(1) of the

Internal Revenue Code of 1939 (Appendix, *infra*). The petition must be filed within 90 days after the date a notice of deficiency is mailed. Section 272(a)(1). As this Court stated in *Di Prospero v. Commissioner*, 176 F. 2d 76, 77 :

There is, at this late date, little doubt that the 90 day requirement is jurisdictional.

This Court recently approved the *Di Prospero* case in *Jorgensen v. Commissioner*, 246 F. 2d 536. There must be strict compliance with the statutory jurisdictional requirements (*Stebbins' Estate v. Helvering*, 121 F. 2d 892 (C.A. D.C.)), and, no matter how apparently inequitable the situation, there is no authority "to relieve the taxpayer from the clear jurisdictional requirements of the law" (*Rich v. Commissioner*, 250 F. 2d 170, 175 (C.A. 5th)). Thus, the Tax Court did not acquire jurisdiction to redetermine the deficiencies unless the petitions were filed within the prescribed 90-day period. *Di Prospero v. Commissioner*, *supra*; *Jorgensen v. Commissioner*, *supra*; *Rich v. Commissioner*, 250 F. 2d 170 (C.A. 5th).²

To file a petition with the Tax Court pursuant to Section 272(a)(1) means actual delivery of the petition

² Accord: *Mindell v. Commissioner*, 200 F. 2d 38 (C.A. 2d); *Galvin v. Commissioner* 239 F. 2d 166 (C.A. 2d); *Underwriters Inc. v. Commissioner* 215 F. 2d 953 (C.A. 3d); *Lingham-Pritchard v. Commissioner*, 242 F. 2d 750 (C.A. 3d), certiorari denied 355 U.S. 846, rehearing denied, 355 U.S. 886; *Kiker v. Commissioner*, 218 F. 2d 389 (C.A. 4th); *Poynor v. Commissioner*, 81 F. 2d 521 (C.A. 5th); *Worthington v. Commissioner* 211 F. 2d 131 (C.A. 6th); *Eppler v. Commissioner* 188 F. 2d 95 (C.A. 7th); *Ryan v. Alexander* 118 F. 2d 744 (C.A. 10th); *Teel v. Commissioner*, 248 F. 2d 749 (C.A. 10th); *Lewis-Hall Iron Works v. Blair*, 23 F. 2d 972 (C.A.D.C.), certiorari denied 277 U.S. 592.

to the Tax Court within the prescribed 90 days.³ *Di Prospero v. Commissioner, supra*; *Jorgensen v. Commissioner, supra*; *Rich v. Commissioner, supra*; *Poy-nor v. Commissioner*, 81 F. 2d 521 (C.A. 5th). Neither petition in this case was actually delivered to the Tax Court within the 90-day period after the notice of deficiency was mailed. The first petition was actually delivered to the Tax Court on February 11, 1957, the 97th day after the notice of deficiency was mailed. The second petition was actually delivered to the Tax Court on April 12, 1957, the 94th day after the notice of deficiency was mailed. The petitions, therefore, were not timely filed in accordance with the actual delivery requirement of Section 272(a)(1). *Di Prospero v. Commissioner, supra*; *Jorgensen v. Commissioner, supra*; *Rich v. Commissioner, supra*; *Worthington v. Commissioner*, 211 F. 2d 131 (C.A. 6th); *Galvin v. Commissioner*, 239 F. 2d 166 (C.A. 2d), and *Lingham-Pritchard v. Commissioner*, 242 F. 2d 750 (C.A. 3d), certiorari denied, 355 U.S. 846, rehearing denied, 355 U.S. 886.

Section 7502(a) of the Internal Revenue Code of 1954⁴ (Appendix, *infra*) temporizes the requirement of actual delivery. However, the section states:

This subsection shall apply only if the postmark date falls within the prescribed period or on or

³ Mailing the petition is neither delivery nor filing. *Lewis-Hall Iron Works v. Blair*, 23 F. 2d 972 (C.A.D.C.), certiorari denied, 277 U.S. 592.

⁴ Section 7502(a) of the 1954 Code is effective even as to taxes imposed by the 1939 Code so long as the mailing, as here, occurred after August 16, 1954. Section 7851(a)(6)(C) and (b) (Appendix, *infra*).

before the prescribed date for the filing of the claim, statement, or other document, * * *

Neither petition here was postmarked before the expiration of the prescribed 90-day period. The cover containing the first petition bore an illegible postmark⁵ but the letter transmitting the petition was dated February 5, 1957. It is reasonable to assume that the petition was not mailed before the date of the letter of transmittal which date was the 91st day after the notice of deficiency was mailed. The cover containing the second petition bore the postmark date of April 9, 1957, which was the 91st day after the notice of deficiency was mailed. Therefore, since neither petition was postmarked within the prescribed 90-day period, Section 7502(a) does not apply. Section 7502(a); *Jorgensen v. Commissioner, supra*; *Galvin v. Commissioner, supra*; *Lingham-Pritchard v. Commissioner, supra*; *Rich v. Commissioner, supra*.

The Tax Court's dismissals were consistent with its previous dismissals in *Galvin v. Commissioner, supra*; *Lingham-Pritchard v. Commissioner, supra*; *Jorgensen v. Commissioner, supra*, and *Rich v. Commissioner, supra*. These dismissals were affirmed by the Second, Third, Ninth and Fifth Circuits, respectively.

In the closely analogous *Rich* case, taxpayer was a prisoner in the Federal Penitentiary, Danbury, Con-

⁵ Taxpayer does not rely upon the postmark date on the cover containing the first petition. Furthermore, he cannot rely on the postmark since it is illegible and does not show the date of mailing. Section 7502 does not permit the consideration of other evidence as to the mailing date. *Madison v. Commissioner*, 28 T.C. — No. 154. The date of the letter accompanying the first petition, February 5, 1957, indicates, persuasively, however, that the petition was mailed after the 90-day period.

necticut. The notice of deficiency was addressed to taxpayer at the penitentiary and was mailed by the Commissioner on February 15, 1956. One hundred and eleven days later, on June 5, 1956, the petition for redetermination was received and filed by the Tax Court. During the interim, taxpayer's attorney had prepared the petition and sent it to taxpayer at the penitentiary. The attorney sent the filing fee to the Tax Court in a letter dated May 5, 1957, stating that the petition would be mailed to the Tax Court. On May 3, 1957, seventy-eight days after the notice of deficiency was mailed, taxpayer requested the prison official in charge of the mail room to send the petition by registered mail to the Tax Court and taxpayer paid the postage. The petition was not mailed until June 4, 1957. The Court of Appeals for the Fifth Circuit stated that all of the equities were with taxpayer but (250 F. 2d 170, 175):⁶

⁶ The court also decided that the letter sent to the Tax Court by the attorney was not intended as a petition, that the Commissioner had not appointed the warden as his agent and that taxpayer was not entitled to 150 days under Section 6213(a), 1954 Code.

The dissenting opinion expresses the view that Congress did not intend the result which the majority decided in the *Rich* case. The dissenting view was based upon the logic of statutory construction there expressed. Nothing was cited, however, in support of the Congressional intent there believed. We submit that Section 7502 demonstrates Congress' choice and plainly delimits the intended relaxation of the prior strict delivery requirement. Subsection 7502(a) does not permit an extension of the 90-day period predicated upon either hardship or equity. See 2 House Hearings before the Committee on Ways and Means, 83d Cong., 1st Sess., General Revision of the Internal Revenue Code, pp. 1344, 1358; Senate Hearings before Committee on Finance, 83d Cong., 1st Sess., Revision of the Internal Revenue Laws, pp. 482, 1325, 2283; H. Rep. No. 1337, 83d Cong., 2d Sess., p. 434 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4583); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 615 (3 U.S.C. Cong. & Adm. News (1954) 4621, 5266).

The law seems to be well settled that, in the absence of specific statutory provisions, imprisonment of a person who might otherwise become a petitioner or plaintiff will not toll in his favor a statute of limitations. 54 C.J.S. Limitations of Actions § 241; 34 Am. Jur., Limitation of Actions, § 214; Annotation 24 A.L.R. 2d 611, 619. See also, *Price v. Johnston*, 1948, 334 U.S. 266, 285, 68 S. Ct. 1049, 92 L. Ed. 1356; *Tabor v. Hardwick*, 5 Cir., 1955, 224 F. 2d 526, 528.

As shown by the authorities cited by the respondent (footnote 3, *supra*), the ninety day period is more than a period of limitation, and the courts have consistently held the prescribed period to be jurisdictional. Judge Walker for our Circuit made a good statement of the rule in *Poynor v. Commissioner*, 5 Cir., 81 F. 2d 521, 522:

* * * A paper is filed when it is delivered to the proper official and by him received to be kept on file. Depositing a paper in the post office in time for it to reach the Board of Tax Appeals in the usual course of mail within the time allowed is not a filing of the paper with the Board. *United States v. Lombardo*, 241 U.S. 73, 36 S. Ct. 508, 60 L. Ed. 897. The Board was without power to dispense on equitable grounds with the requirement of filing within the time allowed. *Yturbide's Executors & Heirs v. United States*, 22 How. 290, 16 L. Ed. 342. See, also, *Muckelroy v. Baldwin*, [8 Cir.] 70 F. 2d 728.

The presumption of delivery in the ordinary course of the mail which was applied in *Arkansas Motor*

Coaches v. Commissioner, 198 F. 2d 189 (C.A. 8th), and *Central Paper Co. v. Commissioner*, 199 F. 2d 902 (C.A. 6th), cannot operate to aid taxpayer. In the *Arkansas Motor Coaches* case, the postmark was dated January 30, 1951, the 84th day after the notice of deficiency was mailed. The petition would have been received in Washington, D. C., in the ordinary course of the mail, on January 31, 1951, the 85th day. In the *Central Paper Co.* case, the postmark was dated December 1, 1950, the 86th day after the notice of deficiency was mailed. The petition would have been received in Washington, D. C., in the ordinary course of the mail, on December 2, 1950, the 87th day. Here, the first petition was not mailed before February 5, 1957, the 91st day after the notice of deficiency was mailed and the second petition's postmark date was April 9, 1957, the 91st day after the notice of deficiency was mailed. Obviously, in neither instance is the presumption apposite.⁷ The Sixth Circuit, which decided the *Central Paper Co.* case, held that the presumption was not applicable in *Gradsky v. Commissioner*, 218 F. 2d 703, and likewise, the Fourth Circuit held in *Kiker v. Commissioner*, 218 F. 2d 389 (C.A. 4th).

Taxpayer seems to argue that the Tax Court's dismissals denied him of due process and a hearing guar-

⁷ Taxpayer claims that he had no control over the mail and that the late filing was due to the negligence of another government agency. (Br. 13-14.) By selecting the method employed, we submit that taxpayer constituted the prison officials his agents. Any delay in placing the petition in the United States mails, therefore, was attributable to taxpayer, as principal. Accord: *McCord v. Commissioner*, 123 F. 2d 164 (C.A. D.C.). Clearly, the prison officials are not a part of the United States Post Office Department nor are such officials a part of the Tax Court of the United States. See *Rich v. Commissioner*, *supra*.

anted by the Fifth and Fourteenth Amendments to the Constitution of the United States. (Br. 9-12.) It is the congressional prerogative to provide and limit remedies for an aggrieved taxpayer. See *Bull v. United States*, 295 U.S. 247; *Brushaber v. Union Pac. R. R.*, 240 U.S. 1; *Federal Grain Co. v. United States*, 35 F. 2d 260 (W.D. Mo.); *Vance v. Vance*, 108 U.S. 514. Congress has established the Tax Court of the United States as an independent agency in the Executive Branch of the Government and has limited the time within which a proceeding may be initiated. Sections 7441 (Appendix, *infra*), and 6213(a), Internal Revenue Code of 1954. The Tax Court is a tribunal with jurisdiction limited in the manner prescribed by statute. Section 7442, Internal Revenue Code of 1954 (Appendix, *infra*); *Lasky v. Commissioner*, 352 U.S. 1027; *R. Simpson & Co. v. Commissioner*, 321 U.S. 225; *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418; *Helvering v. Northern Coal Co.*, 293 U.S. 191. And, a basic tenet of our system of jurisprudence is that an aggrieved party's remedy may be barred, in any case, upon the expiration of the period of limitations within which a remedy might have been pursued. 2 Cooley, *Constitutional Limitations*, pp. 760-765 (8th ed., 1927); *Restatement of Judgments* (1942), Sections 47(e), 49(a). Insofar as a hearing in the Tax Court is concerned, plainly there is no basis for the contention that such remedy has been made arbitrarily inadequate. At any rate, taxpayer's claim that the Constitution has been violated is patently without merit since a proceeding in the Tax Court is not taxpayer's single

recourse.⁸ See Sections 322(b)(1) and 3772(a)(2) of the 1939 Code and Section 7422(a) of the 1954 Code allowing taxpayer to pay the tax, claim and sue for a refund. See also 28 U.S.C., Sections 1346(a) and 1491. It cannot be correctly stated that the failure to have a hearing in the Tax Court is a denial of a day in court. See Br. 13-14.

Taxpayer admits that he actually received the first notice of deficiency on the same day it was mailed and the second notice of deficiency "on or about" the same day it was mailed. (Br. 5, 7.) He had ample time for filing the petition for redetermination within the prescribed 90 days and thereby obtain a hearing and redetermination by the Tax Court. See *Teel v. Commissioner*, 248 F. 2d 749 (C.A. 10th); *Dolezilek v. Commissioner*, 212 F. 2d 458 (C.A. D.C.).

In reality, taxpayer's situation here is no different from that of any other taxpayer who failed to file his petition for redetermination within the 90 days, though he may have done all that he, individually, could once the petition was prepared for delivery. Could it be doubted that taxpayer, individually, had done all that he could in *Poynor v. Commissioner, supra*, where the petition was dispatched by airmail but the delay was caused by adverse weather conditions or in *Stebbins' Estate v. Commissioner, supra*, where the petition was dispatched by airmail but because of weather condi-

⁸ We might point out, in this connection, that taxpayer's situation is unlike that in *Arkansas Motor Coaches Co. v. Commissioner, supra*; *Central Paper Co. v. Commissioner, supra*; *Detroit Automotive P. Corp. v. Commissioner*, 203 F. 2d 785 (C.A. 6th); and *George Kemp Real Estate Co. v. Commissioner*, 182 F. 2d 847 (C.A. 2d). In each of those cases, involving special relief from excess profits taxes, the taxpayer's *only* remedy was that attempted in the Tax Court. Sections 722 and 732, Internal Revenue Code of 1939.

tions the petition was transferred to the railroad or in *Di Prospero v. Commissioner, supra*, where the petition was dispatched by airmail special delivery but the special delivery messenger arrived at the Tax Court after its closing time? In all of these cases, the Courts of Appeals affirmed the Tax Court's dismissal of the petition for lack of jurisdiction. Many situations could be conceived in which an unfortunate delay prevented compliance with the filing requirement. But, the *single* ameliorative provision pertinent here is Section 7502 (a) which permits considering *only* the postmark date as the date of delivery. That date here was not within the prescribed 90-day period. Consequently, the Tax Court had no alternative except to dismiss the petitions.⁹

⁹ The notices of deficiency were sent to taxpayer within the applicable period of limitations on assessments. For the years 1947 and 1948, the assessment can be made at any time because of fraud. For the taxable year 1952, taxpayer executed a waiver extending the limitation on assessment to June 30, 1957. For the taxable year 1953, the limitation on assessment was April, 1957. The notice of deficiency covering the years 1952 and 1953 was mailed to taxpayer on November 6, 1956.

CONCLUSION

The absence of timely filing prevented the Tax Court from acquiring jurisdiction. Therefore, taxpayer's petition was properly dismissed and the order of the Tax Court should be affirmed.

Respectfully submitted,

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FEBRUARY, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) [As amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

Internal Revenue Code of 1954:

SEC. 7441. STATUS.

The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof

shall be known as the chief judge and the judges of the Tax Court.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7441.)

SEC. 7442. JURISDICTION.

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7442.)

SEC. 7502. TIMELY MAILING TREATED AS TIMELY FILING.

(a) *General Rule.*—If any claim, statement, or other document (other than a return or other document required under authority of chapter 61), required to be filed within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such claim, statement, or other document is required to be filed, the date of the United States postmark stamped on the cover in which such claim, statement, or other document is mailed shall be deemed to be the date of delivery. This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of the claim, statement, or other document, determined with regard to any extension granted for such filing, and only if the claim, statement, or other document was, within the prescribed time, deposited in the mail in the United States in an envelope or other appropri-

ate wrapper, postage prepaid, properly addressed to the agency, office, or officer with which the claim, statement, or other document is required to be filed.

(b) *Stamp Machine*.—This section shall apply in the case of postmarks not made by the United States Post Office only if and to the extent provided by regulations prescribed by the Secretary or his delegate.

(c) *Registered Mail*.—If any such claim, statement, or other document is sent by United States registered mail, such registration shall be prima facie evidence that the claim, statement, or other document was delivered to the agency, office, or officer to which addressed, and the date of registration shall be deemed the postmark date.

* * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7502.)

SEC. 7851. APPLICABILITY OF REVENUE LAWS.

(a) *General Rules*.—Except as otherwise provided in any section of this title—

* * * * *

(6) *Subtitle F*.—

(A) *General Rule*.—The provisions of subtitle F shall take effect on the day after the date of enactment of this title and shall be applicable with respect to any tax imposed by this title. The provisions of subtitle F shall apply with respect to any tax imposed by the Internal Revenue Code of 1939 only to the extent provided in subparagraphs (B) and (C) of this paragraph.

(B) *Assessment, Collection, and Refunds*.—Notwithstanding the provisions of subpara-

graph (A), and notwithstanding any contrary provision of subchapter A of chapter 63 (relating to assessment), chapter 64 (relating to collection), or chapter 65 (relating to abatements, credits, and refunds) of this title, the provisions of part II of subchapter A of chapter 28 and chapters 35, 36 and 37 (except section 3777) of subtitle D of the Internal Revenue Code of 1939 shall remain in effect until January 1, 1955, and shall also be applicable to the taxes imposed by this title. On and after January 1, 1955, the provisions of subchapter A of chapter 63, chapter 64, and chapter 65 (except section 6405) of this title shall be applicable to all internal revenue taxes (whether imposed by this title or by the Internal Revenue Code of 1939), * * *

(C) *Taxes Imposed Under the 1939 Code.*—After the date of enactment of this title, the following provisions of subtitle F shall apply to the taxes imposed by the Internal Revenue Code of 1939, notwithstanding any contrary provisions of such code:

* * * * *

(iv) Chapter 76, relating to judicial proceedings.

(v) Chapter 77, relating to miscellaneous provisions, except that section 7502 shall apply only if the mailing occurs after the date of enactment of this title, and section 7503 shall apply only if the last date referred to therein occurs after the date of enactment of this title.

* * * * *

(viii) Chapter 80, relating to application of internal revenue laws, effective date, and related provisions.

* * * * *

(7) *Other provisions.*—If the effective date of any provision of the Internal Revenue Code of 1954 is not otherwise provided in this section or in any other section of this title, such provision shall take effect on the day after the date of enactment of this title. If the repeal of any provision of the Internal Revenue Code of 1939 is not otherwise provided by this section or by any other section of this title, such provision is hereby repealed effective on the day after the date of enactment of this title.

(b) *Effect of Repeal of Internal Revenue Code of 1939.*—

(1) *Existing rights and liabilities.*—The repeal of any provision of the Internal Revenue Code of 1939 shall not affect any act done or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause, before such repeal; but all rights and liabilities under such code shall continue, and may be enforced in the same manner, as if such repeal had not been made.

* * * * *

(d) *Periods of Limitation.*—All periods of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures, hereby repealed shall not be affected thereby, but all suits, proceedings, or prosecutions, whether civil or criminal, for

causes arising, or acts done or committed, prior to said repeal, may be commenced and prosecuted within the same time as if this title had not been enacted.

* * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7851.)

No. 15729

United States
Court of Appeals
for the Ninth Circuit

PLUMBERS & STEAMFITTERS UNION,
LOCAL No. 598,

Appellant,

vs.

W. C. DILLION,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Eastern District of Washington
Southern Division.

FILED

DEC 11 1957

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Eastern District of Washington, Southern Division

Civil No. 978

W. C. DILLION,

Plaintiff,

vs.

PLUMBERS & STEAMFITTERS UNION, LO-
CAL #598 OF PASCO, WASHINGTON;
W. W. CAPE; RUDELL BEAMES; WIL-
LIAM LAWSON; J. P. HEAD, d/b/a/ J. P.
HEAD PLUMBING; J. L. MOKLER and
JAMES MOKLER, d/b/a MOKLER PLUMB-
ING & HEATING; R. E. RANDOLPH and
E. L. TAYLOR, d/b/a RANDOLPH & TAY-
LOR PLUMBING & HEATING;

Defendants.

AMENDED COMPLAINT

Comes now the plaintiff and for his First cause
of Action in his Amended Complaint alleges as
follows:

I.

That defendants, Plumbers & Steamfitters Union,
Local #598 of Pasco, Washington, hereinafter some-
times called the "Local Union," holds itself out to
the general public as representing employees who
are employed generally in the plumbing and steam-
fitting industry; that defendants, W. W. Cape, Ru-
dell Beames and William Lawson are members of
said Local Union, and Rudell Beames is the busi-

ness agent of said Local Union; that W. W. Cape is an assistant business agent of said Local Union and William Lawson is an assistant business agent of said Local Union.

II.

That plaintiff's action arises under the Act of June 23, 1947, C. 120, Title III, Sec. 301, 61 Stat. 156; USC Title 29, Sec. 185.

III.

That defendant Local Union is a labor organization representing [1*] employees in an industry affecting commerce as defined in said Sec. 185, Title 29 USC; that said Local Union maintains its principal office in Pasco, Washington, and its duly authorized officers or agents are engaged in representing or acting for employee members in Pasco, Washington; that the court has jurisdiction of the parties to plaintiff's first cause of action by virtue thereof and as hereinafter appears.

IV.

That during a period commencing June 1, 1954, or thereabouts, and up to and including November 22, 1954, plaintiff discussed with and informed the Executive Board and business representatives of defendant Local Union of his desire to establish a pipe fabricating and installing and pipeline contracting business; that by reason thereof defendant Local Union, Rudell Beames, W. W. Cape and William

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Lawson were apprised of plaintiff's desires, plans and intentions prior to November 22, 1954; that plaintiff, during said period, was advised by representatives of said Local Union that he would have to have a collective bargaining agreement with the Local Union before they would furnish him with men to work in his said proposed business; that said Local Union effectively controlled and still controls the supply of labor available for the type of business in which plaintiff sought to become established, within the area in which plaintiff then proposed to operate; that defendant Local Union through its representatives, informed plaintiff that he must have an existing shop in Pasco, Washington, a contract for work, and a bond to insure payment of labor obtained under the proposed collective bargaining agreement before any collective bargaining agreement would be entered into between said Local Union and Plaintiff. That pursuant to this information, and relying thereon, plaintiff established a shop for fabricating pipe in Pasco, Washington, obtained a contract for work, fabricating and installing pipe, and furnished to said Local Union a bond to insure payment of labor under the proposed collective bargaining agreement.

V.

That plaintiff did thereby establish himself in a pipe fabricating [2] and installing business, seventy-five per cent of which such pipe as would be fabricated and installed by plaintiff in such business he would be required to furnish as contractor on jobs obtained by him, and forty per cent of which such

pipe furnished by him would have to be obtained from without the State of Washington, that is, from Portland, Oregon, and Fontana and Los Angeles, California, and shipped across state lines into the State of Washington, according to plaintiff's plans and as was usual in the pipe fabricating and installing and pipeline contracting business in Washington; that in such business plaintiff would be fabricating and installing pipe carrying liquids and gases across state lines and national boundaries, according to his plans and as is usual in such business.

VI.

That thereafter and on November 22, 1954, plaintiff and defendant Local Union entered into a collective bargaining agreement, the original of which is on file in this court, is marked Exhibit A, and by this reference is hereby made a part of this amended complaint pursuant to stipulation of the parties; that defendant Local Union did thereupon orally agree with plaintiff to furnish to plaintiff men to work in plaintiff's business, and that said parties incorporated such agreement to furnish men in the terms of their said collective bargaining agreement.

VII.

That if said agreement by defendant Local Union to furnish men to plaintiff is not set forth in said collective bargaining agreement in words or by reasonable inference, then the same has been omitted by mistake, inadvertence and neglect and should be

made a part thereof to properly set forth the full agreement of the parties thereto.

VIII.

That plaintiff has fully performed his part of all contracts and agreements entered into between defendant Local Union and himself. [3]

IX.

That pursuant to said agreement to furnish men, plaintiff made demand upon defendant Local Union for men and said Local Union furnished two men to the plaintiff; that plaintiff thereafter informed defendant Local Union of the need for more men and informed defendant Local Union that if such men were not furnished to plaintiff by Local Union, plaintiff would not be able to complete his said work contract and plaintiff would be compelled to go out of business; that defendant Local Union was further informed that there were unemployed union men who were ready, able and willing to work for the plaintiff, and that said defendant Local Union did arbitrarily refuse to furnish men to plaintiff, full knowing such circumstances and in breach of said agreement to furnish men.

X.

That by virtue of the foregoing alleged acts of defendant Local Union, the defendant Local Union is now estopped to deny that it did so agree to furnish men to plaintiff.

XI.

That the two men furnished by said Local Union to plaintiff worked for the plaintiff for a period of a total of 48 hours and plaintiff thereby became and was an employer.

XII.

That the effect of the aforesaid acts of defendant Local Union was to eliminate plaintiff as a purchaser of pipe, as a pipe fabricating and installing contractor from firms in Oregon and California, from which states pipe would be shipped into the State of Washington across state boundaries, thereby suppressing competition in the interstate markets by discriminating between its would-be purchasers.

XIII.

That by reason of the foregoing acts of defendant Local Union, plaintiff lost his contract for his job and was compelled to go out of business, [4] all to his damage in the sum of \$50,000.00.

Comes Now the Plaintiff and for a Second Cause of Action, and in the Alternative, Alleges as Follows:

I.

Plaintiff realleges all of paragraphs I, III, IV, V, VI, VIII, IX and XII of his First Cause of Action hereinbefore set forth as fully as though set forth at length herein.

II.

That plaintiff's action arises under Sections 1-7 and 15, Title 15 USC.

III.

That the defendant, J. P. Head, d/b/a J. P. Head Plumbing, at all times hereinbefore mentioned and material hereto was operating as a pipe fabricator and installer in that area in the State of Washington in which plaintiff established and sought to maintain his said pipe fabricating and installing business; that J. L. Mokler and James Mokler, d/b/a Mokler Plumbing & Heating, at all times hereinbefore mentioned and material hereto, were operating as a pipe fabricator and installer in that area in the State of Washington in which plaintiff established and sought to maintain his said pipe fabricating and installing business; that defendants R. E. Randolph and E. L. Taylor, d/b/a Randolph & Taylor Plumbing & Heating, at all times hereinbefore mentioned and material thereto were operating as pipe fabricators and installers in that area in the State of Washington in which plaintiff established and sought to maintain his said pipe fabricating and installing and contracting business.

IV.

That defendant Labor Union, acting through its authorized representatives, did arbitrarily refuse to furnish labor to plaintiff contrary to its said agreement, in pursuance of a conspiracy with

all of the said other defendants named, all such defendants then full knowing plaintiff's need for labor [5] such as was effectively controlled by defendant Local Union in order to perform his said work contract and to maintain himself in business, said conspiracy being one to injure plaintiff, to suppress competition to defendants J. P. Head, d/b/a J. P. Head Plumbing; J. L. Mokler and James Mokler, d/b/a Mokler Plumbing & Heating; and R. E. Randolph and E. L. Taylor, d/b/a Randolph & Taylor Plumbing & Heating, and to unlawfully interfere with employment by plaintiff of labor in an industry affecting interstate commerce.

V.

That the effect of said conspiracy was that plaintiff lost his contract for his job and was compelled to go out of business, that plaintiff was eliminated as a purchaser of pipe, as a pipe fabricating and installing contractor, from firms in Oregon and California, from which states pipe would be shipped into the State of Washington across state boundaries, thereby suppressing competition in the interstate markets by discriminating between its would-be purchasers; that all of said defendants intended that said effect be the consequences of the acts of said Local Union in refusing to furnish men to plaintiff and that same was the purpose of their said conspiracy.

VI.

That by reason of intent, tendency or the inherent nature of the refusal to furnish men to

plaintiff, the said conspiracy was reasonably calculated to prejudice the public interest by unduly restricting interstate commerce.

VII.

That by reason of the foregoing acts of all of the defendants, plaintiff lost his contract for his job and was compelled to go out of business all to his damage in the sum of \$50,000.00, which should be trebled under the provisions of said Sec. 15, Title 15 USC.

Wherefore, plaintiff prays for judgment against the defendant Local Union on his First Cause of Action, for breach of said Local Union's agreement to furnish men to plaintiff, determining that defendant Local Union is estopped to deny that it agreed to furnish men to plaintiff, and if the collective [6] bargaining agreement entered into between plaintiff and defendant Local Union by its terms does not extend to include an agreement by defendant to furnish men to plaintiff, that it be reformed to show that it does so extend and include such agreement; that plaintiff recover from said defendant Local Union the sum of \$50,000.00 on his First Cause of Action, together with costs, reasonable attorney fees and for such other and further relief as to the Court may seem proper under the circumstances; and in the alternative, plaintiff prays for judgment against the defendants and each of them under his Second Cause of Action in the sum of \$50,000.00 and asks that same

be trebled as allowed by law, that plaintiff be allowed reasonable attorney fees and costs and for such other and further relief as to the court may seem proper under the circumstances.

/s/ WAYNE GOLDSTONE,
Attorney for Plaintiff.

[Endorsed]. Filed April 29, 1955. [7]

[Title of District Court and Cause.]

MOTION TO DISMISS AMENDED COMPLAINT UNDER FEDERAL RULE OF CIVIL PROCEDURE 12 (b)

Comes Now the defendants, Plumbers and Steamfitters Union, Local No. 598, of Pasco, Washington, Woodrow W. Cape, RuDell Beames and William Lawson, appearing by their attorney undersigned, and jointly and severally move to dismiss the first cause of action of plaintiff's amended complaint on the following grounds:

1. That the facts stated therein do not constitute any ground for imposition of liability upon or recovery of damages from these defendants, or any of them.

2. That the plaintiff has failed to exhaust his remedies under the collective agreement which he alleges has been breached by the actions of the defendants.

3. That the facts stated therein do not state or set forth any facts showing any causal connection between the acts alleged to have been performed by these defendants, or any of them, and the damages alleged to have been suffered by the plaintiff.

4. That said cause of action does not state sufficient facts to enable these defendants, or any of them, to know or understand the nature of the action against them or to respond to said action.

5. That the Court is without jurisdiction under the Act of June 23, 1947, C. 120, Title III, Sec. 301, 61 Stat. 156; U.S.C. Title 29, Sec. 185 to grant the relief prayed for by plaintiff in paragraph VII of his complaint as [8] amended.

Further, the above-named defendants jointly and severally move to dismiss the second cause of action of plaintiff's amended complaint on the following grounds:

1. That the facts stated therein do not constitute any ground for imposition of liability upon or recovery of damages from these defendants or either of them.

2. That the facts pleaded therein do not allege any restraint upon or monopoly of commerce between the states.

3. That the facts stated therein do not state or set forth a combination, conspiracy or contract in restraint of or to monopolize commerce between the states.

4. That the facts stated therein do not state facts showing any causal connection between the acts alleged to have been performed by these defendants, or any of them, and the damage alleged to have been suffered by the plaintiff.

5. That said cause of action does not state sufficient facts to enable these defendants, or any of them, to know or understand the nature of the action against them or to respond to said action.

6. That the subject matter of the said cause of action is not an article of commerce within the meaning of the statutes referred to in said cause of action.

7. That the subject matter of said cause of action has been pre-empted by the Labor-Management Relations Act and that the statutes referred to in said cause of action are thereby no longer applicable to said subject matter.

Respectfully submitted,

/s/ JAMES J. MOLTHAN,

Attorney for defendants Plumbers and Steamfitters
Union, Local 598, W. W. Cape, RuDell Beames
and William Lawson.

[Endorsed]: Filed May 11, 1955. [9]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS
AMENDED COMPLAINT

In the above-entitled action the defendants, Plumbers and Steamfitters Union, Local No. 598, of Pasco, Washington, Woodrow W. Cape, RuDell Beames, and William Lawson, jointly and severally moved to dismiss the first and second causes of action of plaintiff's amended complaint. The motion was heard on stipulation of counsel at Spokane, Washington, and was taken under advisement by the Court. The Court has heard the argument of counsel, has considered the written briefs submitted, and is fully advised in the premises.

It Is Now Therefore Ordered that said defendants' motion to dismiss the first and second causes of action of plaintiff's amended complaint is hereby denied, and said defendants are allowed thirty days from the date of this order to answer the amended complaint.

Dated this 17th day of November, 1955.

/s/ SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed November 17, 1955. [10]

[Title of District Court and Cause.]

ANSWER OF J. P. HEAD, J. L. MOKLER and
JAMES MOKLER, R. E. RANDOLPH and
E. L. TAYLOR

Come Now the defendants, J. P. Head, J. L. Mokler and James Mokler, R. E. Randolph and E. L. Taylor and in answer to the Second Cause of Action of the Amended Complaint of plaintiff herein, said defendants allege and deny as follows:

I.

With reference to Paragraph I of the First Cause of Action (realleged by reference in the Second Cause of Action), these defendants admit that Local No. 598 represents employees who are employed generally in the plumbing and steamfitting industry; but these defendants do not have specific knowledge of the capacity of the individuals named in said paragraph and these defendants deny each and every additional allegation in said paragraph.

II.

With reference to Paragraph III of the First Cause of Action (realleged by reference in the Second Cause of Action), these defendants admit that Local No. 598 is a labor organization and [11] admit that said Local Union maintains its principal office in Pasco, Washington, and admit that the duly authorized officers or agents of said Local Union represent its employee members in Pasco, Washington; but these defendants deny each and every additional allegation in said paragraph.

III.

With reference to Paragraph IV of the First Cause of Action (realleged by reference in the Second Cause of Action), these defendants deny each and every allegation contained therein.

IV.

With reference to Paragraph V of the First Cause of Action (realleged by reference in the Second Cause of Action), these defendants deny each and every allegation contained therein.

V.

With reference to Paragraph VI of the First Cause of Action (realleged by reference in the Second Cause of Action), these defendants deny each and every allegation contained therein.

VI.

With reference to Paragraph VIII of the First Cause of Action (realleged by reference in the Second Cause of Action), these defendants deny each and every allegation contained therein.

VII.

With reference to Paragraph IX of the First Cause of Action (realleged by reference in the Second Cause of Action), these defendants deny each and every allegation contained therein.

VIII.

With reference to Paragraph XII of the First Cause of Action (realleged by reference in the

Second Cause of Action), these defendants deny each and every allegation contained therein.

IX.

With reference to Paragraph II of the Second Cause of [12] Action, these defendants deny each allegation contained therein.

X.

With reference to Paragraph III of the Second Cause of Action, these defendants admit that at all times mentioned in the Complaint they were engaged in business in the State of Washington as mechanical contractors, including the business of fabrication and installation of pipe; but these defendants deny each and every additional allegation contained therein.

XI.

With reference to Paragraph IV of the Second Cause of Action, these defendants deny each and every allegation contained therein.

XII.

With reference to Paragraph V of the Second Cause of Action, these defendants deny each and every allegation contained therein.

XIII.

With reference to Paragraph VI of the Second Cause of Action, these defendants deny each and every allegation contained therein.

XIV.

With reference to Paragraph VII of the Second

Cause of Action, these defendants deny each and every allegation contained therein.

Wherefore, defendants pray that the plaintiff take nothing by his Complaint and for their costs and disbursements; and for such other and further relief as may be deemed appropriate.

FERGUSON & BURDELL,

By /s/ CHARLES S. BURDELL,
Attorneys for Defendants J. P. Head, J. L. Mokler, James Mokler, R. E. Randolph and E. L. Taylor.

Receipt of copy acknowledged.

[Endorsed]: Filed December 19, 1955. [13]

[Title of District Court and Cause.]

ANSWER OF PLUMBERS & STEAMFITTERS
UNION, LOCAL No. 598

Comes Now the defendant union and Ru Dell Beames, William I. Lawson and W. W. Cape, the named officers and employees of said defendant union, also named defendants herein, and in answer to the First Cause of Action of the Amended Complaint of plaintiff herein, defendants allege and deny as follows:

I.

With reference to Paragraph I of the First Cause of Action, these defendants admit that Local

Union No. 598 represents employees who are employed generally in the plumbing and steamfitting industry, and deny each and every other allegation, matter and thing alleged in said paragraph.

II.

In reference to Paragraph II of the First Cause of Action, these defendants deny that plaintiff's action arises under the Act of June 23, 1947, C. 120, Title III, Sec. 301, 61 Stat. 156; USC Title 29, Sec. 185.

III.

In reference to Paragraph III of the First Cause of Action, these defendants admit each and every allegation in said paragraph except these defendants deny the Court has jurisdiction of the parties to plaintiff's First Cause of Action. [14]

IV.

In reference to Paragraph IV of the First Cause of Action, these defendants deny each and every allegation contained therein.

V.

In reference to Paragraph V of the First Cause of Action, these defendants deny each and every allegation contained therein.

VI.

In reference to Paragraph VI of the First Cause of Action, these defendants deny each and every allegation contained therein.

VII.

In reference to Paragraph VII of the First Cause of Action, these defendants deny each and every allegation contained therein.

VIII.

In reference to Paragraph VIII of the First Cause of Action, these defendants deny each and every allegation contained therein.

IX.

In reference to Paragraph IX of the First Cause of Action, these defendants deny each and every allegation contained therein.

X.

In reference to Paragraph X of the First Cause of Action, these defendants deny each and every allegation contained therein.

XI.

In reference to Paragraph XI of the First Cause of Action, these defendants deny each and every allegation contained therein.

XII.

In reference to Paragraph XII of the First Cause of Action, these defendants deny each and every allegation contained therein.

XIII.

In reference to Paragraph XIII of the First Cause of Action, these defendants deny each and every allegation contained therein.

Come Now Defendants Above Named and in Answer to the Second Cause of Action of the Amended Complaint of Plaintiff Herein, Defendants Allege and Deny as Follows: [15]

I.

In reference to Paragraph I of the Second Cause of Action, defendants reallege all admissions and denials heretofore made to Paragraphs I, III, IV, V, VI, VIII, IX and XII of plaintiff's First Cause of Action, realleged by reference in plaintiff's Second Cause of Action, as fully as though set forth at length herein.

II.

In reference to Paragraph II of the Second Cause of Action, these defendants deny each and every allegation in said paragraph.

III.

In reference to Paragraph III of the Second Cause of Action, these defendants do not have specific knowledge of the capacity and operations of the individuals named in said paragraph and these defendants therefore deny each and every allegation in said paragraph.

IV.

In reference to Paragraph IV of the Second Cause of Action, these defendants deny each and every allegation in said paragraph.

V.

In reference to Paragraph V of the Second Cause of Action, these defendants deny each and every allegation in said paragraph.

VI.

In reference to Paragraph VI of the Second Cause of Action, these defendants deny each and every allegation in said paragraph.

VII.

In reference to Paragraph VII of the Second Cause of Action, these defendants deny each and every allegation in said paragraph.

For a further and separate first defense, defendant union alleges:

I.

That the collective bargaining agreement referred to in the Amended Complaint contained a provision that any differences arising between plaintiff and the defendant union should be settled by arbitration in accordance with said provision in said contract; that prior to the [16] commencement of this action, the plaintiff gave no notice to the defendant union, its officers and agents, of any of the differences which are the subject matter of this action; that plaintiff failed and neglected to submit said differences or any of them to arbitration and still fails and neglects to submit the said differences to arbitration, pursuant to the collective bargaining agreement.

For a Further and Separate Second Defense, Defendant Union Alleges:

I.

That before the commencement of this action, the defendant union duly performed all of the con-

ditions of the collective bargaining agreement set forth in the Amended Complaint on its part to be performed.

For a Further and Separate Third Defense, Defendant Union Alleges:

I.

This Court has no jurisdiction of said supposed First Cause of Action set forth in the Amended Complaint for the reason that plaintiff seeks to reform the collective bargaining agreement, the original of which is on file in this Court, pursuant to stipulation of the parties, which remedy is not within the operation of Section 301, National Labor Relations Act, as Amended (61 Stat. 156) conferring jurisdiction upon this Court.

For a Further and Separate Fourth Defense, Defendant Union Alleges:

I.

In order to induce defendant union to enter into the collective bargaining agreement set forth in plaintiff's Amended Complaint herein and as a condition precedent to the executing of said collective bargaining agreement, plaintiff stated and represented to the defendant union that he was the sole owner of four welding machines and further that he had executed a lease upon certain premises, all located at the Pasco Municipal Airport, Pasco, Franklin County, Washington, all going to establish his financial responsibility.

II.

The statements and representations as made by plaintiff were false and fraudulent and were known to plaintiff to be false and fraudulent when made. [17]

III.

In truth and in fact, plaintiff did not execute any lease of any sort with any municipal or private authority covering the premises allegedly occupied by him and to be utilized as a shop by him within the meaning of the working rules of the collective bargaining agreement, nor did he ever pay any rent to anyone thereupon; further, plaintiff did seek and solicit third persons to join with him in false and fraudulent representations to any investigators of the defendant union in stating that the four welding machines were actually owned by plaintiff when it was known to plaintiff that the machines had been rented.

IV.

Defendant union believed such statements and representations to be true and was induced thereby to enter into said collective bargaining agreement and would not have entered into said collective bargaining agreement had defendant union known the truth with regard to such statements and representations.

For a Further Separate and Fifth Defense, the
Defendant Union Alleges:

I.

The alleged collective bargaining agreement set forth in the Amended Complaint is illegal and void

and contrary to public policy in that plaintiff and defendant union agreed to and enforced and maintained and attempted to enforce and maintain a collective bargaining agreement, including among other things, Section 3 thereof, a provision reading as follows:

“Hiring and Discharge

“Section 3. The employers agree to hire all employees covered by this agreement from and through the unions and to retain in its employ only members in continuous good standing in the unions. This is to include foremen, general foremen and superintendents.

“The employers agree to forthwith discharge any employee upon written notice from the union that such employee is not in good standing in the union.”

That by reason of executing such a collective bargaining agreement and thereafter attempting to enforce and maintain said collective bargaining agreement, the plaintiff and defendant local union did engage in unfair labor [18] practices within the meaning of Section 8 (a) (3) and Section 8 (b), subsections (1) (A) and (2) of the National Labor Relations Act as Amended (61 Stat. 136).

II.

At the time of executing the alleged collective bargaining agreement, the defendant local union had not been certified by the National Labor Relations Board, pursuant to Section 9, Subsection (c) of the National Labor Relations Act as Amended

(61 Stat. 136) as the collective bargaining representative of any of the employees performing work for the plaintiff as an employer in any operations described in his Amended Complaint or then and there contemplated by plaintiff.

For a Further Separate and Sixth Defense, the Defendant Union Alleges:

I.

That as a condition precedent to executing the collective bargaining agreement described in the Amended Complaint of the plaintiff, the executive board of the defendant union demanded the placement of a bond conditioned upon the sum of \$1500 as and for the payment of wages, payroll taxes and related payroll costs; that on or about the 18th day of November, 1954, the United Pacific Insurance Company, a corporation, by and through its agents, the firm of Sherwood & Roberts, Pasco, Washington, did issue its bond No. 229 092, conditioned and limited to the amount of \$1500, with the Plumbers & Steamfitters Union, Local 598, being the obligee thereof.

II.

That said bond was retained by plaintiff in his possession at all times and never delivered into the possession of the defendant union; that on or about the 10th day of December, plaintiff did surrender said bond together with a collateral receipt evidencing receipt by Sherwood & Roberts for and on behalf of said bonding company of the sum of \$1500

cash collateral to Sherwood & Roberts as agents of said bonding company; that plaintiff gave no notice, orally or in writing, to the defendant union that he had withdrawn the bond upon which the collective bargaining agreement had been executed and has to date given no such notice to defendant union. [19]

III.

That plaintiff, by such conduct, then and there abandoned said collective agreement and has ever since wholly abandoned the same.

Wherefore, defendants pray that the plaintiff take nothing by his complaint and for their costs and disbursements and for such other and further relief as may be deemed appropriate.

/s/ JAMES J. MOLTHAN,
Attorney for Plumbers & Steamfitters Local Union
No. 598, RuDell Beames, W. I. Lawson and
W. W. Cape.

Certificate of mailing attached.

[Endorsed]: Filed December 19, 1955. [20]

In the District Court of the United States for the
Eastern District of Washington, Southern Division

Civil Case No. 978

W. C. DILLION,

Plaintiff,

vs.

PLUMBERS & STEAMFITTERS UNION, et al.,

Defendants.

REPLY

Comes Now the plaintiff above named and replying to the answer of Plumbers and Steamfitters Union Local No. 598 alleges and denies as follows:

I.

Replying to defendants first affirmative defense plaintiff denies each and every allegation there stated.

II.

Replying to defendants second affirmative defense plaintiff denies each and every allegation therein stated.

III.

Replying to defendants third affirmative defense plaintiff denies each and every allegation therein stated.

IV.

Replying to defendants fourth affirmative defense plaintiff denies each and every allegation contained in paragraphs I, II, III and IV thereof.

V.

Replying to defendants fifth affirmative defense plaintiff denies each and every allegation in paragraphs I and II thereof and plaintiff alleges that he does not have knowledge or information regarding the allegations in paragraph II and therefore denies the same.

Replying to defendants sixth affirmative defense plaintiff alleges:

Plaintiff admits paragraph I thereof.

Plaintiff admits that portion of paragraph II whereby it is alleged "that on or about the 10th day of December (1954), plaintiff did surrender said bond together with a collateral receipt evidencing receipt by Sherwood & Roberts for and on behalf of said bonding company of the sum of \$1,500.00 cash collateral [21] to Sherwood & Roberts as agents of said bonding company"; and denies each and every allegation contained in such paragraph II.

Plaintiff denies each and every allegation contained in paragraph III thereof.

Wherefore, plaintiff prays that he be allowed the relief prayed for in his complaint.

/s/ WAYNE GLADSTONE,

/s/ SIDNEY C. VOLINN,

Attorneys for Plaintiff,

W. C. Dillion.

Certificate of mailing attached.

[Endorsed]: Filed January 9, 1956. [22]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above-Entitled Cause, find in favor of the defendants on the second cause of action.

/s/ J. E. ANDERSON,

Foreman.

[Endorsed]: Filed January 17, 1957. [23]

In the District Court of the United States for the Eastern District of Washington, Southern Division

No. 978

W. C. DILLION,

Plaintiff,

vs.

PLUMBERS & STEAMFITTERS UNION,
LOCAL No. 598 of Pasco, Washington; W. W. CAPE; RUDELL BEAMES; WILLIAM LAWSON; J. P. HEAD, d/b/a J. P. HEAD PLUMBING; J. L. MOKLER and JAMES MOKLER, d/b/a MOKLER PLUMBING & HEATING; R. E. RANDOLPH and E. L. TAYLOR, d/b/a RANDOLPH & TAYLOR PLUMBING & HEATING,

Defendants.

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Sam M. Driver presiding, with

all parties appearing by counsel and the issues having been duly tried, and the jury, on the 17th day of January, 1957, having rendered a directed verdict for the defendants on the second cause of action,

It Is Ordered and Adjudged that the plaintiff take nothing on the second cause of action and that said second cause of action be dismissed on the merits and that the defendants recover of the plaintiff their costs on said second cause of action.

Dated at Walla Walla, Washington, this 17th day of January, 1957.

[Seal] STANLEY D. TAYLOR,
Clerk;

By /s/ THOMAS GRANGER,
Deputy Clerk.

[Endorsed]: Filed January 17, 1957. [25]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above-Entitled Cause, find for the Plaintiff in the sum of \$40,000 on the first cause of action.

/s/ J. E. ANDERSON,
Foreman.

[Endorsed]: Filed January 18, 1957. [24]

[Title of District Court and Cause.]

ALTERNATIVE MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT AND
FOR A NEW TRIAL

The defendant, Plumbers and Steamfitters Union, Local 598 of Pasco, moves the Court for judgment notwithstanding the verdict of the jury rendered on January 18, 1957, or, in the alternative, for an order setting aside said verdict and granting a new trial to said defendant for the following causes materially affecting its substantial rights.

1. Irregularities in the proceedings of the Court, jury and the plaintiff by which the defendant was prevented from having a fair trial.

2. Misconduct of the plaintiff and his attorney in arguing the case to the jury.

3. Accident and surprise which ordinary prudence could not have guarded against.

4. Excessive damages, unmistakably indicating that the verdict must have been the result of passion or prejudice.

5. Error in the assessment of the amount of recovery, the same being too large.

6. There is no evidence or reasonable inference from the evidence to justify the verdict and that the same is contrary to law. [26]

7. Error in law occurring at the trial and excepted to at the time by defendant.

8. Substantial justice has not been done.

Dated this 24th day of January, 1957.

BASSETT, VANCE & DAVIS,
Attorneys for Defendant Plumbers & Steamfitters
Union Local 598 of Pasco.

[Endorsed]: Filed January 25, 1957. [27]

In the District Court of the United States for the
Eastern District of Washington, Southern Division

No. 978

W. C. DILLION,

Plaintiff,

vs.

PLUMBERS & STEAMFITTERS UNION,
LOCAL No. 598, Pasco, Washington, et al.,

Defendants.

JUDGMENT

The issues in this action having been brought on for trial before a Jury, and the issues having been tried, and a verdict having been rendered in favor of the plaintiff, W. C. Dillion, against the defendant, Plumbers & Steamfitters Union, Local No. 598, of Pasco, Washington. Now, Therefore,

It Is Hereby Adjudged, that the said Plaintiff, W. C. Dillion, recover of the defendant, Plumbers and Steamfitters Union, Local No. 598, of Pasco, Washington, Forty Thousand Dollars (\$40,000.00) as found by the Jury, with \$328.78, costs of action.

Dated this 1st day of February, 1957.

/s/ SAM M. DRIVER,
Judge.

[Endorsed]: Filed February 1, 1957. [28]

[Title of District Court and Cause.]

ORDER ON MOTION FOR JUDGMENT
N.O.V. OR FOR NEW TRIAL

This matter having come regularly on for hearing before the undersigned Judge on the 7th day of June, 1957, at Yakima, Washington, upon the defendant Union's motion in the alternative for a judgment notwithstanding the verdict or for a new trial, the plaintiff appearing by his counsel, Wayne Gladstone and John Day, and the defendant, Plumbers' Local Union No. 598, by its attorney, J. Duane Vance, and the Court having heard the argument of counsel and being fully advised, Now, Therefore,

It Is Ordered, Adjudged and Decreed:

I.

The motion for Judgment N.O.V. is denied.

II.

The motion for a new trial should be and hereby is granted unless the plaintiff shall, on or before the 14th day of June, 1957, file a consent to remit from the said verdict the sum of \$10,000.00 and take judgment for the sum of \$30,000.00 and costs. If such consent be filed by [29] the plaintiff then the motion for a new trial is denied.

Dated this 12th day of June, 1957.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ J. DUANE VANCE,
Attorney for Defendant.

Affidavit of mail attached.

[Endorsed]: Filed June 12, 1957. [30]

[Title of District Court and Cause.]

CONSENT TO REMITTANCE

Comes Now the plaintiff in the above-entitled action, through his attorneys, Gladstone & Day, and hereby consents to remit from the Verdict and Judgment entered in the above-entitled proceedings the sum of \$10,000.00, and waives his right thereto and consents to take Judgment for the sum of \$30,000.00, with costs.

Dated at Richland, Washington, this 12th day of June, 1957.

GLADSTONE & DAY,

By /s/ WAYNE GLADSTONE,
Attorneys for Plaintiff.

Affidavit of mail attached.

[Endorsed]: Filed June 13, 1957. [31]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the defendant, Plumbers & Steamfitters Union, Local No. 598, a voluntary association, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment made and entered herein on the 1st day of February, 1957, and from the order denying judgment notwithstanding the verdict and for new trial made and entered herein on the 12th day of June, 1957.

VANCE & PETERSON,
Attorneys for Appellants, Plumbers & Steamfitters
Union, Local No. 598, Pasco, Washington.

Affidavit of mail attached.

[Endorsed]: Filed July 5, 1957. [32]

[Title of District Court and Cause.]

STIPULATION

Re: SUPERSEDEAS BOND ON APPEAL

In the above-entitled matter, the plaintiff having, after the entry of judgment and before the hearing on the motion for a new trial, caused its writ of garnishment to be issued out of this court, and the court having thereafter upon the motion of the defendants, dismissed said writ upon the posting of collateral in the form of government bonds by the defendant, and the defendant having accordingly posted government bonds in the registry of the court of the face value of \$52,000.00 subject to the further order of the court and said bonds remaining in the registry of the court and the court having subsequently denied the defendant's motion for a new trial upon the consent to remittitur filed by the plaintiff, which was so filed, and said bonds still remaining in the registry of the court, and the defendant being desirous of appealing from the judgment herein and all proceedings in connection therewith, now, therefore,

It Is Agreed between the parties thereto as shown by the signatures of the undersigned counsel, that in lieu of the supersedeas bond herein, the aforementioned United States government bonds deposited with the registry of the Clerk of this Court, shall serve as security for the plaintiff during further proceedings, appellate or otherwise, in all respects as a supersedeas bond, and in the event of a final judgment in favor of the plaintiff in this proceed-

ing, the Court may make such order or orders directed to the defendant or its officers or agents, as may be [33] necessary and proper in the premises to secure to the plaintiff such protection as he would have had, had a surety bond been filed herein.

GLADSTONE & DAY,

/s/ JOHN F. DAY,

Attorneys for Plaintiff.

/s/ J. DUANE VANCE,

VANCE & PETERSON,

Attorneys for Defendant.

[Endorsed]: Filed July 5, 1957. [34]

[Title of District Court and Cause.]

ORDER APPROVING STIPULATION IN
LIEU OF SUPERSEDEAS BOND

This matter having come regularly before the Court pursuant to the stipulation of counsel hereto attached in which it is agreed that certain United States government bonds of the face value of Fifty-two Thousand Dollars (\$52,000.00) and payable to the defendant Union and now in the registry of the Court, shall remain in the registry of the Court, subject to the further order of the Court in lieu of a supersedeas bond on appeal, now, therefore,

It Is Ordered, Adjudged and Decreed that the stipulation of the parties hereto attached be, and is hereby approved in lieu of supersedeas bond herein.

Done this 8th day of July, 1957.

/s/ SAM M. DRIVER,
U. S. District Judge.

Presented by:

/s/ J. DUANE VANCE,
VANCE & PETERSON,
Attorneys for Defendant.

Approved by:

GLADSTONE & DAY,
/s/ JOHN F. DAY,
Attorneys for Plaintiff.

[Endorsed]: Filed July 8, 1957. [35]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE AND
DOCKET RECORD ON APPEAL

Upon motion of the Clerk of this court and for good reason shown, the time to file and docket the record on appeal in the above-entitled cause is extended to and including October 1, 1957, under the provisions of Rule 73(g) of the Federal Rules of Civil Procedure.

Dated this 24th day of July, 1957.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed July 24, 1957. [36]

[Title of District Court and Cause.]

NARRATIVE ABSTRACT OF
TESTIMONY OF WITNESSES

(Testimony of J. P. Head, a defendant called as an adverse witness, tr. p. 47.)

My name is J. P. Head and I am in the plumbing and heating business in Pasco, Washington (tr. p. 47). I was so engaged in this business all during 1954 and was a member of the joint conference board during that year (tr. p. 48). The other members of the joint conference board were Leonard Mokler [1353] and Robert Randolph (tr. p. 48). The appointment to the joint conference board was an informal affair (tr. pp. 48, 49). There were very few meetings of the local joint conference board (tr. p. 49). I am a member of Local 598 of Pasco (tr. p. 49). I joined in about 1936 or 1937 (tr. p. 49). I employ from twenty to sometimes fifty or sixty men (tr. p. 50). Their trade is plumbing and fitting and welding (tr. p. 50). I own the building that the union headquarters are located in and have owned it since 1948 (tr. p. 51). They leased the building in either 1949 or '50 and have occupied it continually since (tr. p. 51).

(At this point, Mr. Head was asked where he obtained the materials used in his business and there was an objection by Mr. Burdell. Mr. Day said: "We have alleged, your Honor, that these parties were potentially and were actually in competition and interstate commerce is a ground of jurisdiction

here. We have plead both the jurisdictional grounds. We have plead competition by Mr. Head with Mr. Dillion and we are, of course, establishing through this line of questioning that Mr. Head also is engaged in the same type of interstate commerce business'' (tr p. 52).)

I know W. C. Dillion. He worked for me in 1952. He was an average welder (tr. p. 53). I never saw the shop that he set up at the Pasco Air Base in 1954 (tr. p. 53). We obtained the men that we employ from Local 598 (tr. p. 53). I have had the occasion of having to wait for men. I eventually got them (tr. p. 53). I first became acquainted with the fact that Dillion was seeking men from Local 598 in November of 1954 (tr. p. 53). I talked to Beames about it. I asked him if Dillion had been granted an agreement (tr. p. 54). Beames said the executive board was handling it (tr. p. 54). If I [1354] wanted any further information I'd have to contact the executive board (tr. p. 55). I talked to Mr. Randolph that same day and explained to him as far as I knew from what I had heard some sort of an agreement had been issued to Dillion that was not one of our agreements, it was some sort of an agreement that was drawn up by their attorney (tr. p. 55). I suggested that Mokler or Randolph call a meeting of the joint conference board to meet with the executive board to see the special agreement (tr. p. 56). The meeting was November 29, I believe, or the 30th. The executive board or some of the executive board was there and one of them brought out

the agreement. It was on a typewritten piece of paper. It was a limited agreement for, I believe, 120 days and limited Dillion to fabrication and pipeline work (tr. p. 57). It was suggested that instead of a special agreement they should give Dillion a Washington state agreement (tr. pp. 57, 58). I bid on the job that Mr. Hopkins had and that Mr. Dillion ultimately got a contract on (tr. p. 60). I submitted my bid to Mr. Hopkins on a lump sum by telephone (tr. p. 61). Equipment necessary to do that job would be four to six welding machines complete with cut-off heads and so forth, the lowboy and crane and all our rigging (tr. p. 63). You can rent an extra machine in two or three places in Pasco (tr. pp. 63, 64). Sixty per cent of my income is from industrial piping and forty per cent from plumbing and heating (tr. p. 64). This job was industrial piping job (tr. p. 64). I have considered setting up a fabricating shop in the Tri-City area (tr. p. 64). I do fabricating for our own work (tr. p. 64). I have a collective bargaining agreement with Local 598, what is termed the Washington state agreement (tr. p. 65). The pipe that was used on this job was procured by the Atomic Energy Commission (tr. p. 71). There is a certain type of pipe manufactured in the state of Washington. [1355] There is clay pipe and culvert pipe and tubing and similar types of pipe along that line. There is no big steel mills (tr. p. 72). At the meeting of the joint conference board on the employer's side there was Mr. Mokler, Mr. Randolph and myself (tr. p. 98). On the employee's side Mr. Lambert, I believe,

and Mr. Carver, I don't recall a Mr. Barrett. I don't know whether Mr. Fuqua was there. I don't know about Mr. Morris. I beleive Mr. Don Edwards was there and I believe Mr. Whittaker was there (tr. p. 99). No minutes were kept. I don't recall any conversation with Mr. Beames prior to the thirtieth day of November, or the twenty-ninth when the joint conference met where Beames informed me that Dillion was not living up to the Washington state agreement (tr. p. 102). The only protest I had at the joint conference board about the agreement that Dillion has was that they should get him a Washington state agreement instead of a special agreement (tr. p. 103). I made no statement at the joint conference board meeting as to the qualifications of Dillion to do the work that he got an agreement to do, but it could have been stated that due to the lack of welders in the area it looked like they were going to have a hard time getting the job done. That was discussed (tr. p. 104). I don't recall making the statement at the meeting of the joint conference board, "What the hell do you mean by giving Dillion the agreement" (tr. p. 109). I did not make statements substantially to the effect that I would sue the union and Hopkins and Beames and see that Dillion never got the job and I did not make a statement substantially to the effect that I would go to hell before I would see Dillion get the job (tr. p. 109). I have never used nonunion plumbers, fitters, or riggers or welders in my work (tr. p. 110). My only shop is in Pasco (tr. 110). I have another building in Richland (tr. p. 110). [1355-A] Thorne

and Marble finished the job that Mr. Dillion had a contract for (tr. pp. 121, 122). There is a well-recognized and well-known distinction between the term "industrial piping work" and the term "pipeline work" (tr. p. 123). I do industrial piping work but not pipeline work (tr. p. 124). I submitted a bid for the particular contract with Mr. Hopkins for the installation of the job that is the subject of this case (tr. p. 127). My bid covered the handling of the pipe, which was either 66- or 72-inch pipe from the time it hit the Hanford Area, that was on railroad cars, until the time that we lowered it into the riverbed (tr. p. 128). The local joint conference board is elected according to the procedures in the Washington state agreement, that is, three employers elected by the employers of their area and three journeymen elected by the local union. Their duties are to hear grievances from the local union against an employer or from an employer against a local union and to iron out those difficulties at a local level, if possible (tr. p. 131). The Washington state agreement is a state-wide agreement between the United Association of Plumbers and Steamfitters and the employers of the state of Washington (tr. p. 131). The type of work that I was bidding on here with Mr. Hopkins was an out-fall process sewer line. That is industrial piping (tr. p. 135). I submitted my bid in a lump sum (tr. p. 135). By telephone (tr. p. 136). The entire pipeline that was to be laid there was, if I can recall, 700 feet (tr. p. 137). Mr. Hopkins and I had two different versions of how the job was going to be done.

Mr. Hopkins wanted to use divers and bolt it together on the river bottom and I wanted to float it out and gradually sink it. That was where we had our falling out (tr. p. 138). My bid for this job was approximately \$30,000.00 (tr. p. 140). [1356]

End of testimony of Mr. Head.

Testimony of Fred J. Harless (tr. p. 144).

My name is Fred Jackson Harless. I live at 13 North Newport, Kennewick, Washington. I am a member of Steamfitters Local 598, Pasco, Washington, and was in 1954 (tr. p. 144). I am a member in good standing up to this date (tr. p. 145). In 1954 I was the duly elected President of Local 598 (tr. p. 145). I was elected in the Fall election of 1953. Beames' election or appointment as Business Manager ran over into my term (tr. p. 146). He was elected, after I was elected, after my term expired in 1955 (tr. p. 146). Beames was financial secretary and business manager (tr. p. 147). The other offices in the Local were the President, Vice President, Financial Secretary, Secretary or Secretary and Treasurer (tr. p. 149). There was an examining board for steamfitters, and examining board of three members for the plumbers. Each examining board was of three members (tr. p. 149). The body of the union elects four members to the executive board. The Vice President serves as Chairman of the executive board (tr. p. 150). There were three members of the local representing the employees on the joint conference board (tr. p. 150). In November of

1954 the executive board members were William T. Whittaker, vice president and chairman; Mr. Fuqua, Mr. Morris, Mr. Lambert and Mr. Edwards (tr. p. 150). The members of the local joint conference board were L. A. Carver, Art Kuntz, and Mr. Barrett (tr. p. 151). The executive board is a group that is elected by the body to conduct business for the local between meetings (tr. p. 153). The business agent conducts just what the office states, he conducts the business of the local, takes care of the correspondence, and makes contacts for employment for the members, and like all the rest of the officers, is supposed [1357] to look out after the welfare of the local (tr. p. 153). He has the administration of the office and makes dispatches of men to employers (tr. p. 153). In conference with the general organizer he would make determination with regard to jurisdictional strikes or other strike activities (tr. p. 153). The general organizer in this area is Mr. Bilderback, who represents the International (tr. p. 154). During the year 1954 it was the responsibility of Mr. Beames to determine the dispatch of men to local contractors (tr. p. 155). Mr. Beames had two assistants in November, 1954, Mr. Woodrow Cape and Mr. William Lawson, and these men also made dispatches of men from the Local (tr. p. 155). It was the responsibility of Mr. Beames, Mr. Cape or Mr. Lawson to prevent local contractors from obtaining men from any source except the Local (tr. p. 155). They have an assigned area (tr. p. 156).

(Plaintiff's Exhibit 3, Constitution and Bylaws of the United Association of Plumbers and Steamfitters identified and admitted (tr. p. 157, 158).)

Duties of the President are determined from the UA constitution and bylaws (tr. p. 159). It is not common practice for the union to require bond of an employer (tr. p. 161). I was in on the executive board meeting whereby they asked Dillion to furnish a \$1,500 labor bond (tr. p. 161).

(Plaintiff's Exhibit 4 marked for identification (tr. 161). Plaintiff's Exhibit 4 identified as a letter from James D. Molthan, attorney, to Plumbers and Steamfitters Local 598 (tr. 162).)

At that time Mr. James Molthan was attorney for the local (tr. p. 163).

(Excerpt 4 rejected (tr. p. 171).)

On November 17, I received special [1358] instructions concerning the handling of Mr. Dillion's request for a collective agreement from Mr. Molthan, the attorney for the union (tr. p. 173). This was unusual (tr. p. 174). I was never requested to sign a collective bargaining agreement for any employer. That was the business of the Business Manager (tr. p. 174). The Business Manager did sign collective agreements with other employers during the period of my office (tr. p. 174). I had occasion, as President of Local 598, to meet with the executive board and discuss the applications of employers for collective bargaining agreements (tr. p. 174). I had no vote but was sometimes asked my opinion

(tr. p. 174). We sometimes discussed the availability of men for a particular contract (tr. p. 175). The executive board would consider the availability of men before they would give a collective bargaining agreement (tr. p. 175). I sat in on an executive board meeting when Mr. Dillion's application for a collective bargaining agreement was being discussed (tr. p. 175). Mr. Lawson agreed to have a suitable agreement drawn up at once for Mr. Dillion (tr. p. 176). It was not to my knowledge the policy of the Local to permit employers to obtain employees from other locals; Employers working within the jurisdiction of 598. The business agent generally contacts other locals to see if they have labor available, but maybe in the case of where he couldn't supply these men it might be agreeable to him. That I couldn't say (tr. pp. 176, 177). I don't know of cases where contractors attempted to go outside the jurisdiction of the Local to get men (tr. p. 177). The executive board generally approved or disapproved contracts for employers and also inspected the man's shop (tr. pp. 178, 179). There were two men at the same time applying for contracts, Mr. McMillan and Mr. Dillion, and at the same executive board [1359] meeting each man was discussed (tr. p. 179).

(At page 183, questioned by Mr. Day:)

Q. "Within the framework of union security, the determination of union security, are there obligations to the employer by the unions which are

generally understood under the terms of union security?"

A. "Well, you have an obligation—I mean for a day's work for your ability, and, naturally, he is your employer, that is bread and butter that you have."

Q. "Is it common understanding regarding the union's obligation to furnish men?"

A. "Absolutely. That is why he has got a contract with the Union."

It is the common understanding that he will use nothing but union men and they agree to wages and hours of work and fringe benefits and that the union will furnish men to the employer (tr. p. 184). In this particular case, the executive board left written instructions to the business agent to man this job (tr. p. 185). A man that belongs to another local of the UA coming into the jurisdiction of 598 will bring a clearance card. It is a traveling card and if he does not have it he takes a ten-dollar deposit and writes for the card. There isn't any attempt to restrict that to men who join the local originally (tr. p. 190). A man who comes in on a clearance card is in as good a standing as anybody else (tr. p. 190). It has been necessary numerous times in recent years to go out and recruit men for the Tri-City area (tr. p. 191).

(Plaintiff's Exhibit 2 admitted in evidence (tr. p. 194).)

I understood that Mr. Dillion was going into the fabrication business, not the pipeline (tr. p. [1360] 204). A pipeline agreement to my knowledge can only be given by the International and it is only handled out of one local in Oklahoma. This Local 598 and no other local could give a straight pipeline agreement (tr. pp. 204, 205). Another way of recruiting new men is by getting new members (tr. p. 217).—I knew that Dillion needed men during November of 1954 (tr. p. 217). A new member would have to pass an examination and have the required five years' experience and pay an initiation fee equal to the wages for 100 working hours (tr. pp. 217, 218). That would take roughly a month (tr. p. 219). The executive board discussed the equipment Mr. McMillan had to have to commence business with (tr. p. 219). Mr. McMillan had four walls and a little box that contained approximately \$15 worth of tools and that they couldn't do one job with, let alone supply journeymen and four fifths of whiskey (tr. p. 220). He furnished a bond (tr. p. 220). I think the minutes of the executive board show that they stipulated what their decision was. I can't repeat them word for word, but I think there was something on the order that they would give him (Dillion) a Washington state agreement within ninety days if he didn't break the Washington state agreement within 90 days that he would have a full Washington state agreement (tr. p. 226).

(End of testimony of Mr. Harless.)

(Testimony of Witness Marquard H. Arndt.)

My name is Marquard H. Arndt (tr. p. 230). I am chief of the construction branch for the Atomic Energy Commission in Richland, Washington. In November of 1954 I was chief of the contracts and report branch (tr. p. 231). My job is to supervise a group of people who put together technical plans and specifications and prepared contracts ready for public advertising, bidding and award of contracts (tr. p. 231). [1361] I caused, 1954, to be prepared under my direction a request for bids on an outfall project in what is described as area 100-B in the Hanford Project (tr. pp. 231, 232).

We use water from the Columbia River to cool our reactors at the Hanford Works. After this water has gone through a reactor it is quite hot physically and thermally, also radioactive. That water is then dumped into a big retention basin where it lays for a certain period of time until the water has a chance to cool off, radioactively and thermally. After tests are taken on it, and it is safe to do so, it is then dumped back into the Columbia River. This structure that we are talking about here is about 90 feet of pipe leading up to an outfall structure, which is about the size of a small two-story house called a surge chamber made of reinforced concrete. From this about 700 feet of 66-inch pipe leads that water out to the middle of the Columbia River, where it is introduced into the river, and, of course, out there mixed with the whole Columbia River sufficiently diluted to be absolutely

harmless. The reason for a surge structure is that the reactor in this case sits up on a bluff and from there the water has to run down to this retention basin and from there it gets into this particular project of the contractor that we are talking about, and when it gets to this surge chamber then it drops off down this bluff and goes off over into the river. The reason for the surge chamber is it is a building—if the surge chamber were not there and this intermittent flow of so much water, that water rolling down that hill intermittently would pull a vacuum inside the pipe and the air pressure on the outside of the pipe would collapse it. Of course, destroy the system. So this surge chamber is open to the atmosphere. It has an overflow out one side, a concrete sluiceway to introduce any [1362] overflow water that might go over that way down to the river and when the water stops, just some air then is admitted to the stream going into this pipe down the side of the bluff and that prevents the pipe from collapsing (tr. pp. 232, 233). The pipe is 66 inches in outside diameter and the wall thickness of the pipe is $\frac{1}{2}$ inch (tr. p. 233). A number of similar structures have been built on the Hanford Project prior to this contract that we are talking about here (tr. p. 234). Mr. Head has had a more recent contract in which he installed a similar facility not prior to this project (tr. p. 234). Mokler Plumbing and Heating did not and neither did Randolph and Taylor (tr. pp. 234, 235). I am an electrical engineer by training but have worked in civil engineering and some mechanical engineering (tr. p. 235).

I am a professional engineer licensed by the State of Washington (tr. p. 235). I requested bids on this particular project (tr. p. 236). A fair cost estimate was prepared prior to the time bids were called for (tr. p. 236). The fair cost estimate was \$125,000.00 for this pipeline job (tr. p. 236). A fair cost estimate is an estimate prepared by our own government estimators which is sealed in an envelope and opened at the time of the bid opening with the rest of the bids. It is necessary for the Federal government to have some idea before they award the low bidding contractor whether the low bid that is submitted is a reasonable price or not (tr. p. 237). The fair cost estimate in this case was \$125,000.00. That was for doing the work, building the 90 feet of pipe, putting in the surge chamber and building the other 700 feet of pipe down to the river and all necessary digging and so on in connection with it plus the reinforced concrete sluiceway, plus quite a bit of riprap along the bank (tr. pp. 237, 238). The lowest bid that [1363] we considered responsive completely to the bids was that of Lewis Hopkins Co. of Pasco for \$137,777.00 (tr. p. 238). We rejected the bid of the Cisco Construction Co. as not responsive (tr. p. 238). This was really all one type of work and for that reason put into all one contract (tr. p. 239). We made a separate breakdown for the mechanical portion (tr. p. 239). By the mechanical portion of the job we usually think of as that portion of the job that is predominantly done by the craft known as United, belonging to the United Association of Plumbers and Steamfitters. The total amount of the

fair cost estimate for the mechanical portion of the work was \$25,000.00 (tr. p. 239). That portion of the work was to bring the 90 feet of pipe to the inlet side of the surge chamber and that came up just flush with the inside wall of the surge chamber and the outgoing pipe started about 5 feet within the surge chamber and went down the bank 700 feet out to the middle of the river (tr. pp. 239, 240). It was attached to the surge chamber on the inlet side where approximately 3-foot piece of this 66-inch pipe just cast into place in the reinforced concrete. The way this thing has to be done, the carpenter craft has to build the wood forms for the reinforced concrete and then the pipefitter craft had to jig this piece of 3-foot or 66-inch pipe into place; that is, 3 feet of length, longitudinal length of pipe, that is 66-inch pipe. Now that has to be jugged into place by the pipefitters working with the carpenters there and then after that is done then the labor craft actually places and vibrates the concrete into place around that so that on the inlet side, that is the way the pipe was put into place (tr. p. 240). The Lewis Hopkins Co. would have the carpenters who put in the forms for the concrete around this particular contract and he would probably have the laborers who placed the concrete [1364] in and vibrate it. We figure the fair cost estimate, we figure profit and overhead (tr. pp. 244, 245). We took direct labor and material estimates from our experience. To that we add 10 per cent for overhead and 10 per cent for profit for the piping sub-contractor's fair cost estimate that we prepare and

then we figure 10 per cent on top of that for the general contractor (tr. p. 245). The first 10 and 10 for the mechanical contractors is a cascaded percentage, or 21 per cent is added to the mechanical sub-contractor's estimate. In estimating the fair cost estimate, we figured for the mechanical sub-contractor's portion 10 and 10, and then an additional 10 per cent for the overhead profit and the general contractor which eventually in this case became Lewis Hopkins (tr. p. 252). The total percentage of overhead and profit as allowed for the mechanical portion of the contract to the general contractor would have been the direct cost plus 33 per cent. When we figured the fair cost estimate of \$25,000.00 it was not that 33 per cent of that \$25,000.00 overhead and profit. Of that \$25,000.00 included 21 per cent of the labor and material direct cost (tr. pp. 252, 253). The real cost of the mechanical portion to the government would be \$25,000.00 plus 10 per cent or \$27,500.00. Lew Hopkins' bid was somewhat higher for the general contract than the fair cost estimate (tr. p. 253). The bid was awarded Lewis Hopkins on October 26, 1954, and it was to be completed within 120 days after notice to proceed (tr. pp. 253, 254). The notice to proceed was issued on November 17, 1954, and acknowledged by the Hopkins Company on November 19, 1954, and his time for completion ran from the 19th so it was to be completed within 4 months after November 19 (tr. p. 254). March 19, 1955, was the completion date (tr. p. 254). When we set the completion times for these contracts we [1365] take into consideration

the availability of labor supply in the area to complete the contracts (tr. p. 254). We are advised by authorities on this matter as to the availability of labor in the area (tr. p. 254). The lack of any particular craft involved in this work, the lack of supply for any particular type of craftsmen, would substantially affect the performance time (tr. pp. 254, 255). We considered that pipefitters were available to complete this work within 120 days (tr. p. 255). The completion certificate for the contract was signed on February 17, 1955 (tr. p. 255). At that time I would not have been directly advised of any major delays in the performance of contracts. I would see them in the form of reports at that time (tr. p. 256). We have no records that show a lack of pipefitters to complete this job or shortage of pipefitters to complete this job (tr. p. 257). The AEC had people in the field directly supervising this contract whose duty was to report any labor shortage (tr. p. 257). I know Mr. W. C. Dillion (tr. p. 257). I had contact with Mr. Dillion during 1954 (tr. p. 258). In terms of dollars, the estimate of profit not including overhead, but profit on the mechanical contract, that the mechanical contractor would have made from that job on the basis of our estimate was \$2,500.00. It is roughly 10 per cent of \$25,000.00, but you are adding 10 per cent profit to another figure to arrive at \$25,000.00, so it is something different, a little bit different than \$2,500.00, it is very close to \$2,500.00, a little bit more than \$2,500.00 (tr. p. 269). And that is the

profit, which, according to our estimates, the mechanical contractor would have made on the job (tr. p. 269). If the general contractor was to do everything except actually weld the pipe, such as furnish the cranes, the lowboys and some welding machines and haul the material to the [1366] job, it is possible that the cost of the mechanical contract would have been as low as \$14,000.00 or within shooting distance of a figure like that (tr. p. 271). In that case, the mechanical contractor would have gotten a profit of around \$1,400.00. When we figured \$25,000.00 we just considered that the mechanical contractor would do all his normal work (tr. p. 272).

(Testimony of W. C. Dillion (tr. p. 279):)

My name is William Chester Dillion. I am a plaintiff in this action (tr. p. 279). I have been a welder since 1936. I first went into the union in 1939 up in Lima, Ohio. The boilermakers had all the pipeline work at that time. I was raised mostly in Boulder, Texas. I took my welder training at the White-Miller Boiler works in Houston, Texas. That is where I first started. I went to about the fifth or sixth grade and then they put me in high school. I started my welding training in 1936. I didn't join the union in 1939. I worked on a permit with the union with the Boilermakers Union in Lima, Ohio. I joined the Boilermakers in 1940 or 1941. I am now a member of the Plumbers and Steamfitters Union and have been since I believe 1942, either 1942 or '41 (tr. p. 281). In 1952 I lived at North Richland. I have been a member of the Plumbers Union ever since I joined

in 1942 (tr. pp. 281, 282). I have followed the welding trade ever since 1936, 1952. I am married and have three children (tr. p. 282). I believe it was on September 7 the first time that I went to the executive board (tr. pp. 282, 283). I had planned all the way when I come in here in 1948 to go into business. I seen what it was like and I had that in mind all the time, you know, to go into business here (tr. p. 283). In 1949 I went down and talked to Mr. Larish about going into business here. He was the business agent for 598 at the time (tr. p. 283). He told me that Charlie Gammett would [1367] be a good man to go in with (tr. p. 283). I recognized it takes a sum of money to get your equipment and what not to go into business (tr. p. 284). In 1952 I started working on it. I started studying how other people was bidding work and everything like that. Other contractors was bidding work (tr. p. 284). I bought some buildings in the area and I started building a home. I knew I had to have some capital and some backing so I started building me a home and I thought I could finance that in order to get backing (tr. p. 284). I was working and following my trade during that time (tr. p. 284). I worked on my home off and on, when I wasn't looking at prints and stuff like that and the Journal and studying them I was working on my home (tr. p. 285). I talked to representatives of Local 598 around June or July the first time in 1954 and then in September (tr. p. 285). I talked to the executive board. Before June or July of 1954 I had talked to Mr. Beames (tr. p. 285). I talked to him I think on September 7 (tr. p. 286).

I talked to Mr. Lawson a long time before that, maybe a year (tr. p. 286). Lawson is an assistant business agent for 598 (tr. p. 287). That would have been in the summer of 1953. At that time I asked Lawson about going into business with me (tr. p. 288). He said he didn't have no money so I forgot him about going into business at that time (tr. p. 289). He said he thought a fellow could make some good money if he got set up (tr. p. 289). I had other conversations with him in 1954. I dealt with him all the time from October, somewheres in October. I dealt with him all the time up until—I had talked to him I know when I would be down to pay my dues or something like that and I would see him and he knew that I was trying to get set up for business (tr. p. 290). I talked to him all along about going into business for myself (tr. p. 291). This matter of my going into business was [1368] presented to the body of the union around June or July of 1954 (tr. p. 291). I also talked to Mr. Beames about going into business during the summer of 1954 (tr. p. 291). It was in October. Oh, I guess September 7, when I talked to him (tr. p. 292). It was some time in October that I talked to him first (tr. p. 293). The first formal meeting I had with the executive board was November 16, no, September the 7th (tr. p. 294). I had talked to the executive board in June or July—I attended a meeting of the executive board and I told them I wanted to go into business (tr. p. 295). At that meeting in June or July I just went in and told them I was

figuring on going into business so I wanted an agreement with the Local so I was read off, I think, before the body and they asked the body that I was wanting an agreement with the Local (tr. p. 296). At the meeting on September 7, 1954, that was with the executive board of Local 598 and took place at their hall in Pasco (tr. p. 296). I went there and I told them that I wanted to go into business and I would like to put a shop in Enterprise, Washington, and they told me if I would get me a shop out there, put me a telephone in, that they would present me an agreement, and you know, everything like that, but I would have to live up to everything, you know (tr. pp. 296, 297). Enterprise is a little unincorporated place west of Richland and was in 1954 (tr. p. 297). My purpose in talking over my business plans with the executive board was you've got to find out if it is all right to put in a business some place and if they won't let you put in a business, why, there ain't no use of putting—if you can't get no men, why, if you put in a business some place, why—(tr. p. 297). At the time I was consulting with them I didn't ask for no men, I was just trying to set up a place of business where the local would be satisfactory with them, so I could eventually get some men (tr. pp. 297, 298). [1369] The meeting on September 7 was just a short meeting there, it didn't last too long and there was one of the fellows was off of that at the time (tr. p. 298). There was nobody besides myself and the executive board there (tr. p. 298). The next meeting I had with the executive board was on the 15th

of November. Before this meeting on November 15 I had contacted Mr. Beames in September or October (tr. p. 298). I seen him at his office (tr. p. 299). I asked Mr. Beames about putting in a shop in Enterprise and he said no he wouldn't go along with that and I asked him about the Y. He said no he wouldn't go along with that either. He told me the reason, he said you just pay travel time from your shop to the job and he said "We will get travel time from the union hall to the job." And I said "Well, if you will let me put in out there, why I will pay the same travel time from the union hall to the job" and he said "No, you will have to either come into Kennewick or Pasco." So then I had to start looking and find me a place either in Kennewick or Pasco (tr. p. 299). And I did find a place at the Pasco Air Base, Building 118 (tr. p. 299). The City of Pasco rent out the buildings. It was in the city limits. I found it out before I went out and leased the building (tr. pp. 299, 230).

(Plaintiff's Exhibit 5 marked for identification (tr. p. 300).)

I talked to the executive board on the 15th and on the 16th (tr. p. 300). Before this, after I'd set up my shop and before my first meeting with the executive board I had talked with Bill Lawson (tr. pp. 300, 301). This was in his office in Local 598. I had asked him about getting an agreement, I think (tr. p. 301). I discussed my shop with him and its location and getting set up (tr. p. 302).

(Plaintiff's Exhibit 6 marked for identification (tr. p. 302).) [1370]

I asked Mr. Cotton if I could lease that building at the Pasco Airport and I signed the lease (tr. p. 302). I went to the city hall and paid the rent on it and I went to the power company and put up \$100 for my power (tr. p. 302).

(Plaintiff's Exhibit 7 marked for identification (tr. p. 302). Plaintiff's Exhibit 8 marked for identification (tr. p. 302). Plaintiff's Exhibit 9 marked for identification (tr. p. 303).)

Mr. Cotton was manager of the Pasco Airport (tr. p. 303). Exhibit 9 is the lease I signed. That is my signature. It was prepared in Mr. Cotton's office (tr. p. 303).

(Plaintiff's Exhibit 9 admitted in evidence (tr. p. 304).)

Exhibit 6 is the city treasurer's receipt that I paid on the building for a lease to the city. I gave them \$70 (tr. p. 305).

(Plaintiff's Exhibit 6 offered in evidence (tr. p. 305). Plaintiff's Exhibit 6 admitted in evidence (tr. p. 306).)

I had my discussion with Mr. Cotton about leasing space at the Pasco Airport either in September or October (tr. p. 306). This instrument, Exhibit 9, I got the first day I was over there (tr. p. 306). Exhibit 8 is telephone service (tr. p. 307). I got it

from the telephone office (tr. p. 308). That was for the telephone and building 118, for the phone I had in the shop at the Pasco Airport (tr. p. 308).

(Plaintiff's Exhibit 8 admitted in evidence (tr. p. 308).)

Exhibit 7 was put up for my power in the shop (tr. p. 308). This \$100 was put up for the power (tr. p. 309).

Plaintiff's Exhibit 7 admitted in evidence (tr. p. 309). [1371] Exhibit No. 5 is my contractor's license I got in Kennewick (tr. p. 309). I got it from the city (tr. p. 310). From the city of Kennewick (tr. p. 310). This is just across the river from Pasco (tr. p. 310). I got a Kennewick city license because Mr. Beames told me I had to go either in Kennewick or Pasco. I didn't figure it made any difference where I got it, whether I got it in Pasco or whether I got it in Kennewick (tr. pp. 310, 311). The airport was in the city limits in Pasco in '54. (tr. p. 311). I wanted to qualify to do business in the city of Kennewick as well (tr. p. 311).

(Plaintiff's Exhibit 5 admitted in evidence (tr. p. 311). Plaintiff's Exhibit 10 for identification marked (tr. pp. 311, 312). Plaintiff's Exhibits 11, 12, and 13 were marked (tr. p. 312).) Plaintiff's Exhibit 10 is one of my business cards, Dillion Pipe Fabrication and Pipeline Contractor, that I had printed up when I went into business (tr. p. 312).

(Plaintiff's Exhibit 10 admitted in evidence (tr. p. 312).)

Plaintiff's Exhibit 11 is a Columbia Basin News where I had my cards and stationery printed. It is a receipt for my cards and stationery (tr. 313).

(Plaintiff's Exhibit 11 admitted in evidence (tr. p. 313).)

Plaintiff's Exhibit 12 is a receipt for payment on a telephone bill (tr. 313).

(Plaintiff's Exhibit 12 admitted in evidence (tr. p. 314).)

Plaintiff's Exhibit 13 is from the Seattle First National Bank in Pasco for checks being mailed (tr. p. 314).

(Plaintiff's Exhibit 13 offered in evidence (tr. p. 314).) [1372]

This is a bill for printing my name on some checks (tr. p. 315).

(Plaintiff's Exhibit 13 admitted in evidence (tr. p. 315).)

I have been gathering up tools all the time and buying them—I started acquiring my tools and equipment in '53 (tr. p. 315). I acquired tools over a period of time. I would go to sales and stuff like that and buy tools and if I would get a good buy on some tools that's what I would do (tr. p. 315). I traded a building for a winch truck (tr. pp. 315, 316). In 1954 I had two welding machines and a winch truck and pipe dies, pipe wrenches, cutting torch, all kinds of crescent wrenches and stuff like that, see, pipe wrenches (tr. p. 316). I had a bunch

of pipe, about \$3,000 worth of pipe on hand (tr. p. 316). The next meeting with the executive board meeting on November 15, 1954, was a special meeting (tr. p. 317). It was held on a Monday (tr. p. 317). We met at the Local 598 in Pasco. Present was Red Fuqua, Don Edwards, Bill Whittaker, Dick Lambert and Blackie Morris (tr. p. 317). I told them that I wanted to get an agreement with the local and wanted them to—asked them what I had to do to get the agreement with the local and they told me about the bond, what I had to do, and so they said, “You go over and get a bond just like McMillan had.” (tr. pp. 317, 318). So then I went over to Jim Molthan’s office and when I got there Jim wasn’t there, so Ruth his secretary and wife, she wrote me up an agreement and I went back (tr. p. 318). Jim Molthan was the attorney for the local at the time. I discussed my shop with them at the meeting on November 15. I had gone through these preparations of setting up my shop (tr. p. 318). As far as the executive board is concerned, they wanted to know everything you know, what [1373] you had and everything like that (tr. p. 318). They made no attempts themselves that night to determine what I had (tr. p. 318). The executive board did at one time look at my shop (tr. p. 318). I believe that was on the 16th, it could have been on the 22nd, I’m not sure (tr. p. 319). I had another meeting with them on the 16th of November. The same people was there (tr. p. 319). I don’t know whether that was the night where I went down and got Bill Lawson or not to come down. He was the assistant

business manager (tr. p. 319). On the first meeting on November 15, they asked me if I had talked to any of the business agents and I told them I had. They wanted to know who and I told them I had talked to Bill Lawson (tr. pp. 319, 320). This was a special meeting on Monday night (tr. p. 320). On that night I discussed with them my shop. I believe that is the night they went out to the Pasco Airport and looked at my shop (tr. p. 319, 320), that is the members of the executive board (tr. p. 320). On November 16, all of the members of the executive board were again present and I again discussed with them the proposition of going into business (tr. p. 321). Mr. Lawson was there (tr. p. 321). I went out to his house and got him out of bed and brought him down to meet with them (tr. p. 321). You've got to have a business agent there to discuss you know, everything with him and then he goes and gets a lawyer to write up an agreement (tr. p. 321). They indicated they would want to have a business agent there during the course of the discussion (tr. p. 322) and I went and got him out of bed and brought him down to the executive board meeting (tr. p. 322). They authorized him to give me a satisfactory agreement (tr. p. 322). I am referring to a collective bargaining agreement with the local (tr. p. 322). This is the type of agreement that specifies working conditions and pay rates and the like of that (tr. p. 322). [1374] Bill Lawson said if the executive board would leave it to him that he would get me a satisfactory agreement that I could work

under (tr. p. 322). The executive board said "As long as he gets a satisfactory agreement that's all we want." (tr. p. 323.) The equipment that I mentioned that I had acquired previously was not then at my shop, it was at my home except one welding machine. I made a deal with Mr. Jack Cooney for one welding machine (tr. p. 323). Mr. Jack Cooney runs the school out there at the Pasco Air Base. He was moving out of the shop here that I rented and moving in a bigger shop (tr. p. 323). The shop that I was getting had been used for welding previously (tr. pp. 323, 324). He had used it as a school and he was moving out (tr. p. 324). He said he would leave me all the switch boxes and I was already set up for business then. There was one welding machine left there that I was going to rent off of him (tr. p. 324). I think there were 13—12 or 13 welding machines, something like that in the shop on the night the executive board went out there (tr. p. 324, 325). This shop was one building, not just a room, it was one building (tr. p. 325). Besides the switch boxes and the welding machines that were there I had a desk and Jack told me he was going to leave a table there, just a little steel table (tr. p. 325). At the time they went out to look at it, I had at that time a desk, the welding machines, although the welding machines belonged to the school, except the one that I made arrangements with Jack to rent and the desk was going to be left there for my use (tr. p. 325). The desk would be left there as long as I wanted to lease the building (tr. pp. 325, 326). The meeting of the executive board on November 16 was

on a Tuesday night ("Question: Did you get a Washington State agreement, a collective bargaining agreement, after that [1375] meeting, Mr. Dillion?")

"A. Well, the next morning, I had taken Bill Lawson home that night and we stopped by a bar and had a beer, I bought him a couple of beers, and then I had taken him on home, and he told me, he said, 'Well,' he said, 'Tater,' he said, 'I believe you will do good if you can get men.' And he said, 'I think you can get plenty of men.' And I thanked him, I told him I appreciated anything he could do for me when I was just getting started.

"So I had taken him on home and he said, 'Molthan is in Seattle and as soon as he gets back, why,' he said, 'I will contact him and——' " (tr. pp. 326, 327).

On the evening of the 16th at the executive board meeting I was told I had to have my bond, a \$1,500 bond (tr. p. 327). I would have to have a bond and give it to the Local so that it would pay, you know, in case I didn't have enough money on a payroll to pay the men. That was the stated purpose of the bond (tr. p. 327). They said I would have to get an agreement with the Local and then go see Dunning and Ray or Sherwood and Roberts to get the bond (tr. p. 327). They indicated Mr. Molthan would draw up the papers (tr. pp. 327, 328). They indicated that is who I should see about the bond and the collective bargaining agreement and he was the

attorney for the Local and he had his office in Kennewick (tr. p. 328). I saw Molthan the next morning, the morning of the 17th (tr. p. 328). I saw him at his office in Kennewick (tr. p. 328). He called Bill Lawson over to his office while I was there (tr. p. 328). I told him about the job if I got an agreement with the local that I could get in the area (meaning the Hanford Works Area). The job I am speaking of is the contract with Mr. Hopkins that I ultimately got covering work in the Hanford [1376] Area in 100-B. That 66-inch line that Mr. Arndt testified to (tr. p. 329). I discussed it with Mr. Molthan and Mr. Lawson in Mr. Molthan's office (tr. p. 330). Mr. Molthan written up this collective bargaining agreement and he didn't hardly give Bill a chance to talk because he was trying to put another concern, steel plant, in (tr. p. 330). I discussed the bond in Molthan's office (tr. p. 330). He called Ike Myers over at Sherwood and Roberts and told him on my agreement that I had with the Local, he said, "If there is any flaws in there, erase it and go ahead and write him a bond." I had taken this bargaining agreement with the local to the hall and there was a girl in there by the name of Bess, I believe that is Mr. Beames' secretary. She wrote it up, all the copies, and I had one and they had one or two. I don't know just how many there were (tr. p. 330, 331). That was the agreement with the local Mr. Molthan gave me to have Bess type out (tr. p. 331). On the 17th I went to see the bonding company that day. I saw Ike Myers, a representative of Sherwood and Roberts (tr. p. 331). Mr. Molthan, the attorney for the local,

told me about the bond, that is the way to keep guys, contractors, out. They will write up an agreement where no bonding company will bond them and that is the reason that he said "That is the way we keep other contractors from getting an agreement with the Local" (tr. p. 332). Exhibit 14 is the agreement that I have testified to that Mr. Molthan prepared a hand-written draft of, and that I discussed with Mr. Molthan in the presence of Mr. Lawson and typed up in the local office by Mr. Beames' Secretary, Bess (tr. p. 334). I asked Bill Lawson to sign it and he said Rudy Beames was in Tulsa and he said that he would have to sign it, I mean he was referring to Rudy Beames would have to sign it (tr. p. 335). This was on the 17th. On the 18th of November, Rudy Beames came in. I believe [1377] he was in Tulsa and he came in about 2:00 o'clock, somewhere about there that evening and I asked him to sign it and he said "Well," he said, "I am a little tired," and he said "I will come down there in the morning and sign it or have Bill Lawson or Woody Cape sign it" (tr. p. 335). On the 19th I went back to the Local and saw Beames and Lawson. I don't recall which one I seen first but I guess it was Mr. Beames because Bill had already told me that he would have to sign it (tr. p. 336). I asked him about signing it and he said, "Well," he said, "see Bill." So I went up to see Bill, Mr. Lawson (tr. p. 336). Mr. Head was in Bill Lawson's office at that time and when I first walked in and I walked on back in the back and seen Mr. Beames and I asked him about signing it and he said "Well,

go on up and see Bill.” He said, “He will fix you up. As soon as he comes in he will fix you up.” So I went up there and then I seen him and Head, Mr. Head is up there together, so when I went in the office, when I went up there to see Bill, why he said “Well, I can’t sign it, you will have to get Rudy to sign it” (tr. p. 337). Mr. Head and Mr. Beames were together in Mr. Beames’ office (tr. p. 338). That was after I went back to see Mr. Lawson (tr. pp. 338, 399). Beames came in there at quarter to twelve and I asked him to sign my agreement again and he said “Well,” he said, “I don’t know whether your agreement calls for this contract or not.” And Head come by there just at that time and he said “Rudy, I’ll buy your dinner up at the Elks,” and then they went to the Elks for dinner (tr. p. 339). Rudy is Mr. Beames (tr. p. 339). On Thursday the 18th I saw Mr. Beames. He had just gotten back from Tulsa so I came back then Friday the 19th and saw him and Mr. Lawson in the morning (tr. p. [1378] 342). On the afternoon of the 19th, I went down to Lew Hopkins’ office (tr. p. 342). In the afternoon of the 19th I saw Rudy and Bill Lawson (tr. p. 343). Lawson told me he couldn’t sign my agreement. He said “I can’t sign it.” He said “Rudy will have to sign it” (tr. p. 343). This was after Mr. Head had mentioned to him going to the Elks for lunch (tr. p. 343). When I went in there Rudy had said “Well, Bill, we’ll fix you up,” that morning, I believe. I believe it was on the 19th and Bill—no, I don’t know whether that was the day that he signed the agreement or whether it was on the 22nd (tr. p.

343). Beames told me that him and Head was going out to the AEC to find out if this was my contract or not. They was going to look over the prints (tr. p. 344). That conversation took place in Beames' office (tr. p. 345). On the afternoon of the 19th, Friday, 3:45, I spent almost all day the rest of the day in the union hall waiting for them to come back so I could talk to them. I was trying to get my agreement signed but I didn't see him any more that day (tr. p. 345). I believe I went to his house the next day on Saturday, that is, Beames' house, on Saturday, the 20th (tr. p. 345). I saw him there. I asked him about, you know, getting by agreement signed and he said well, he would have to see Jim Molthan and he said they didn't know whether that job called for my contract or not (tr. p. 346). He was going to see if my agreement covered that contract (tr. p. 346). I didn't have a contract to Mr. Hopkins at that time, but Beames knew what work I was contemplating doing (tr. p. 346). Over the week end, the 20th and the 21st, I was running around seeing the members of the executive board and the business agents. The executive board and Bill Lawson and Mr. Molthan (tr. p. 347). I seen Whittaker, Fuqua, Don Edwards and Lambert (tr. p. 348). I don't know whether it was this Saturday or whether it was the next Saturday I saw Mr. Beames (tr. p. 348). [1379] But I was seeing members of the executive board at their homes. I talked to each one of them, on Saturday and Sunday (tr. p. 348). On Monday, the 22nd I seen Mr. Beames, Mr. Lawson and Mr. Cape (tr. p. 349). On the 22nd, we had a

special meeting of the executive board at night at Local 598 (tr. p. 349). I told them that I had to have some men, that I had to get this signed, so they told me that they had authorized Rudy Beames to give me a satisfactory agreement, and so that is about all they could do (tr. p. 349). Beames had possession of this draft of the agreement during that time (tr. p. 349). On the 23rd, I went to Mr. Beames' house and asked Mr. Beames if he would come down and meet with the executive board and he said he wouldn't meet with them no place at no time and I asked him if he would come down and unlock his office up to get my agreement out and he said yes, he said, I will do that, and he didn't come down, he sent Woody Cape down to unlock (tr. pp. 349, 350). I can't recall whether that was the evening of the 22nd at the time of the executive board meeting or not but I did get the agreement out of the files (tr. p. 350). It wasn't signed then, it was signed on the 23rd. That is when I picked it up, on the 23rd, and it was signed when I picked it up. It had been signed by Mr. Lawson (tr. p. 350). The conversation I had with Mr. Beames when he said he wouldn't meet with the executive board was at his house and I believe Mr. Wooten was present (tr. p. 351). When I went in the office on the 23rd, I went back to Rudy's office and Bill had told me, he said "I've got you fixed up" and Mr. Lawson said "I've got you fixed up." As I walked by to go back to Mr. Beames' office, and so I went back there and Bill was there and he picked up the agreement. We went up in his office and I signed it and Mr. Lawson

—I signed it up in Mr. Lawson's office, but he had already signed it, Mr. Lawson had (tr. p. 351). At that time, I [1380] told him I was going to need some men and in just a couple of days because this pipe was coming in and I had to get it off the tracks. I didn't have very much time to get it off (tr. p. 351), (tr. p. 352). At that time he was informed of the job that I was contemplating doing for Mr. Hopkins (tr. p. 352). As to my contract with Mr. Hopkins, I had to have UA men you know, in order to do this job and I had to have an agreement with the Local to get union men, see, and I had to get enough men you know, to man the job (tr. p. 352). At that point the only obstacle to doing the work was getting the men (tr. p. 352). I mentioned to Mr. Lawson at that time that I would be needing men (tr. p. 352). On Wednesday the 24th I went in and seen Mr. Beames and I also seen Mr. Lawson in Local 598 (tr. p. 353). I went in and I told Mr. Beames, I said "I'm just getting started," and I said "There is Roy J. Smith out here, a welder, and Blackie Sandford, he is a rigger," and well he is just an all-around good man, and I said "They are good men," and I said, "I would appreciate it if you let me have them," and he said "I know they are good men," and he said "We'll see." And so I never did get those men though, and I told Bill Lawson, I said, "There is Mr. Wooten," I said, "I would like to have him for foreman if you could give him to me," and he said "I'll call Ray and see," because I was just getting started out, and you know, I wanted to get a little help, see. They

did not give me those men (tr. p. 353). They did not dispatch those men to me at that time (tr. p. 354). Beames didn't say anything at that time whether he would or would not give me the men I had requested. This was on the 24th (tr. p. 354). Lawson didn't say anything about whether he would or would not give me those men at that time (tr. p. 354). On Thursday, the 25th, that was Thanksgiving. I went down to Lew Hopkins' office and went over the prints with him, and [1381] discussed that morning how we was going to put this pipe in the river. I had had conversations with him about that prior to that (tr. p. 355). On the 23rd, I had shown him the agreement (tr. p. 355). On the 26th, the day after Thanksgiving on a Friday, I seen Mr. Beames, Mr. Lawson and Mr. Cape. I didn't miss none of them. When I saw Bill Lawson I asked him about getting men. He told me, he said "I can't give you no men," he said, "That's all. You'll have to see Rudy." He said, "Rudy will have to give you men," (tr. pp. 355, 356). I saw Rudy then. Rudy said he didn't know whether my contract called for that job or not and he would have to see Mr. Molthan and meet with him, and that was the extent of my conversation with those parties at that time (tr. p. 356). That signature on the top of the page on Exhibit 14 is mine (tr. p. 357). The one at the bottom of the page is Bill Lawson's (tr. p. 358).

(Plaintiff's Exhibit 14 admitted in evidence (tr. p. 358).)

Plaintiff's Exhibit 2 is the Washington State Agreement referred to in Exhibit 14 (tr. 358, 359).

These two instruments, Exhibits 2 and 14 constitute my agreement with the union. On Friday, November 26, when I went in to see Rudy Beames I asked Bill Lawson for some men and he said he couldn't give me no men, said I would have to see Rudy, and when I seen Rudy he told me that he didn't know whether my agreement called for that job out there or not, that he'd have to see Mr. Molthan, their attorney, and he said he was going to meet with him over at the Elks Club and have dinner and talk things over and Mr. Lawson went with him and he said that he would send Mr. Lawson back and have him to tell me one way or the other (tr. pp. 359, 360). Lawson said when he came back, he said Mr. Head and Mr. Beames had went out to see [1382] AEC and to look over the prints, so I waited until 5:00 o'clock that evening and Mr. Beames never did show up and I asked Mr. Lawson if he thought I should wait any longer and he said no, he won't show up now, so I went home (tr. p. 361). On Saturday, the 27th, I went by Mr. Beames' house and saw him and he said he had not seen Mr. Molthan, he was in Seattle and he hadn't got to see him, so I went around and asked the executive board again that day, to all of them, and asked them what they thought about it, so that night I called Mr. Molthan's house and I talked to either his mother or her mother (tr. pp. 361, 362). I called Mr. Molthan at the Roosevelt Hotel in Seattle (tr. p. 362). I called my brother in Texas. He was a welder (tr. p. 362). On Sunday, the 28th, I went to Mr. Beames' house again and asked if he had seen Molthan. I

told him I had to have some men and I had to get this thing straightened up (tr. p. 362). He said he would get with Mr. Molthan as quick as he could, so I went by Molthan's house (tr. pp. 362, 363). On Sunday I picked up my brother in Pendleton (tr. p. 363). That was on the 28th (tr. p. 363). On November the 29th, I saw Mr. Beames at his office. I told Mr. Beames that there was Roy Smith and Blackie Sanford and Al Dillion out there that I would like to have and he said, "Well," he said, "You ain't going to get them all," and I said "Well, if they want to work for me I believe I can get them." "Well," he said, "you ain't going to get them all." He said, "I'll give you one." So I said, "Well, I'll take Al Dillion then." He said "Well, I'll be damned. Taking your own damned brother out there as foreman," see, and I said, "Mr. Beames," I said, "You didn't give me no other choice," I said (tr. pp. 364, 365). So he picked up some papers, threw them down on the desk and said, "Why in the hell don't you go ahead and sue. That is what you want to do," and I said "No, all I [1383] want is some men," so I told him, I says, "Go ahead and give Al a dispatch," and he said, "I wasn't going to get those other men," so he had Dorothy there to write him a dispatch and so I sent him on down there to get cleared in through security (tr. p. 365). I talked to Bill Lawson and Woody Cape both on that same day. Woody Cape, Bill told me, said he couldn't give me no men, Mr. Lawson said he couldn't give me no men, so when I talked to Mr. Cape, why he told me, he said "Dillion," he said,

“If you hadn’t asked for those men,” he said, “Rudy would probably have given them to you,” so he said, “Do you know Bill Meeler” (tr. p. 365). I said, “Yes,” and he said “He is a good man,” he said, “I’ll tell you what I’ll do.” He said, “I’ll give him to you now.” That was that evening, on the 29th that he said “Tomorrow I’ll give you some more men,” so I said “Well, that’s fine. I’ll be glad to have him.” So that was all that day then (tr. p. 366). On the evening of the 29th, Monday, I saw Rudy Beames and he told me that he wanted me to meet with the conference board and the executive board to discuss my case and when I got home they had called my wife and left a note there for me to meet with them on that board to discuss my case. I went down to the hall that evening (tr. p. 368). When we first went in, all of us went in. I went in the office there with them, and they asked me to step outside while they discussed my case (tr. pp. 368, 369). Mr. Head asked me to step out (tr. p. 369). There was Mr. Randolph, Mr. Mokler, Mr. Head, Whitey Carver, Dick Lambert, Blackie Morris, Red Fuqua, Don Edwards and Harry Barrett (tr. p. 369). And Art Kuntz (tr. p. 369). I heard some conversations. They were talking about me. Mr. Head was calling on the phone and he was pretty mad (tr. p. 369). He was just screaming it out. He said, “I’m going to see Dillion don’t get no men.” I don’t know who he was [1384] talking to or anything about it, but me and Mr. Lawson was sitting right there at the door (tr. p. 370). They were in there I would judge at least two hours. I was there

until about midnight myself (tr. p. 370). On Tuesday, November 30, I took my brother out to the job and the other fellow, Meeler, had not cleared through Security yet, and then I came back, and when he got cleared through Security then I taken him out to the job and then I called Beames up (tr. pp. 370, 371). The workers must be cleared through the Security Office because they work in the Hanford Area (tr. p. 371). I called Beames up from the area out there and asked him for some more men. I asked him for some welders and some riggers and he said he didn't have no welders or riggers there. He had some plumbers, and he hung up (tr. p. 371). When I came to town Mr. Bilderback was in (tr. p. 371). He is a representative of the International (tr. p. 372). Mr. Bilderback, Mr. Beames, Mr. Lawson, Mr. Cape and Mr. Head were all in a meeting in Mr. Beames' office. I didn't figure I could get to see them anyway, so I went down and talked to Mr. Hopkins and I called the NLRB in Seattle (tr. p. 372). I talked to Mr. Arndt of the Atomic Energy Commission (tr. p. 372). Mr. Arndt made an appointment for me to see Mr. Thurston (tr. p. 373). Mr. Thurston is over the building trades out at Richland. He is an employee of the Atomic Energy Commission (tr. p. 373). On Wednesday, the 1st of December, I had an appointment with Mr. Thurston out at the AEC Building in his office (tr. p. 374). Mr. Thurston called Mr. Beames while I was there (tr. p. 375). On Wednesday, the first, before I went to Mr. Thurston's office I had taken Al Dillion and Mr. Meler out to the job. Meler quit that day (tr. p.

378). I saw Beames that day, Wednesday the first, well, I didn't see Mr. Beames that day. I saw Bill Lawson and Cape. I almost begged them for [1385] men and they said no, we can't give you no men, you'll have to see Mr. Beames. That was in the union hall (tr. p. 379). I hung around the union hall for awhile (tr. p. 380). I saw Mr. Thurston that night at his house (tr. p. 381). That night I saw Mr. Bilderback at the Pasco Hotel and I asked him for some men (tr. p. 381). On Thursday, December 2, I went in the hall to see if I could get some men and Mr. Beames wasn't in, so I asked Mr. Lawson and Mr. Cape if they would give me some men and they still said I would have to see Mr. Beames. I stayed around there until about 3:00 o'clock. About then Mr. Beames and Mr. Bilderback came in and I followed them right in the office and jumped them for some men. I told them I was going to lose my contract if I didn't get some men, and so Mr. Beames, he was awful shaky, and he had a letter from Mr. Molthan, and he said of this letter, said my contract didn't call for that job and he said if I give you any men Mr. Head is going to fine me \$250 (tr. p. 382). On Friday, the 3rd of December, I didn't see anybody in the union at that time for men. I didn't see no use of trying any longer (tr. p. 383). The house that I started to build in 1952, having in mind that I could use it to help me acquire necessary capital for my business, I mortgaged it to obtain capital for my business (tr. pp. 383, 384). I mortgaged the house for \$2,500 and I borrowed \$1,500 (tr. p. 384). They was loans from friends of

mine (tr. p. 384). They were people in no way connected with this case (tr. p. 384). They were not members of the United Association of Plumbers and Steamfitters, no (tr. p. 384). I had two welders (meaning machines) at my house. I bought one from Red Hodges and paid him \$337.50 for it (tr. p. 384). This equipment that I had was at my house at the time the executive board examined my shop at Pasco (tr. p. 385). Mr. Morris of the executive board examined the equipment at my house (tr. p. [1386] 385). I had a welder that I paid \$337.50 for, the one that I mentioned. I bought the other welder from Mr. Sloan for \$300.00 (tr. p. 385). I improved the portable one, the gas-driven one, the one that cost me \$337 (tr. p. 385). I put another mag on it and spark plugs and just kind of tuned it up (tr. p. 386). I guess there was around \$25 worth of repairs on it (tr. p. 386). I had a winch truck. I traded a building for it. It was 54 feet long. I had paid \$250 for the building (tr. p. 386). I had to overhaul that winch truck and put a boom on it and new line and I worked on the motor (tr. p. 386). All told, I would say I had around \$700 in the winch truck (tr. p. 387). I also had a pickup. I paid \$700 for it. I didn't put any improvements on it, I did put a heater in it. That's all, the heater was worth about \$30 (tr. p. 387). I had a cutting torch, that would run about, tips and everything, about \$137, that is for gauges and everything (tr. p. 387). I mentioned some pipe dies. I had bought these secondhand from a fella and I think I paid him around 30-some dollars, I don't recall just what it was (tr. p. 388). I had pipe

wrenches and crescent wrenches. I don't know how much I had invested. All miscellaneous tools, I guess I had \$300 worth of tools altogether (tr. p. 388). I also mentioned skids, pipe and cable materials. I got those in the area. They went with this building and I had to tear it all out and clean it all up (tr. p. 388). I would say they was worth \$500 worth of skids and cable. That is my estimate of the whole thing (tr. p. 389). Skids are 4x6's or 4x4's and you lay it across a ditch (tr. p. 389). It is a long piece of lumber (tr. p. 390). I made no further attempts to complete my contract with Mr. Hopkins after the 3rd of December on Friday (tr. p. 390). After that period of time, after the 3rd of December, I sold all my pipe and everything to Mr. Hopkins (tr. p. 390). For [1387] \$1,900 (tr. p. 391.) I didn't sell the torch or the dies, the pipe dies, I didn't sell them. I didn't sell the pickup to him. I sold the truck to him, the pickup was left out. I sold the pickup, the torch and the dies at a later time (tr. p. 391). I sold the dies and tools to Mr. Kezer in Seattle for \$150 (tr. p. 391). I still have the torch (tr. p. 392). I sold the pickup for \$300 (tr. p. 392). Exhibit 42 is my time book (tr. p. 392).

(Exhibit 42 admitted (tr. p. 393).)

Exhibit 41 is my payroll check to Mr. Dillion, my brother (tr. p. 393).

(Exhibit 41 admitted (tr. p. 393).)

Exhibit 40 is my payroll check to Bill Meler (tr. p. 394).

(Exhibit 40 admitted in evidence (tr. p. 394).)

Exhibit 39 is the slip that was attached to a check that I received from Mr. Hopkins for the equipment I sold to him (tr. p. 394).

(Exhibit 39 admitted in evidence (tr. p. 394).)

Exhibit 36 is a receipt for materials which I purchased. This was for an acetylene gauge. It is dated September 13, 1954 (tr. p. 395).

(Exhibit 36 admitted in evidence (tr. p. 398).)

Exhibit 32 is my payroll where Hopkins paid me.

(Exhibit 32 admitted in evidence (tr. p. 398).)

Exhibit 33 is a receipt I got for supplies that I use in connection with going into business. That was for stationery and cards.

(Exhibit 33 admitted in evidence (tr. pp 398, 399).)

Exhibit 34 is a slip that was attached to one of the checks I got from Mr. Hopkins when he purchased some equipment from me (tr. p. 399). [1388]

(Exhibit 34 admitted in evidence (tr. p. 400).)

Exhibit 35 is a receipt for repair work done on my truck.

(Exhibit 35 rejected (tr. p. 401).)

Exhibit 30 is one of the slips that my employees returned to me (tr. p. 402).

(Exhibit 30 admitted in evidence (tr. p. 403).)

Exhibits 21 and 31 are the same type.

(Exhibits 21 and 31 admitted in evidence (tr. p. 403).)

Exhibit 26 is one of the records that I kept my business on the employees that I had working for me (tr. pp. 403, 404).

(Exhibit 26 admitted in evidence (tr. p. 404).)

Exhibit 28 is a welder qualification slip for Bill Meler (tr. p. 404).

(Exhibit 28 admitted in evidence (tr. p. 404).)

Exhibit 15 is a report form on the vacation plan and health and welfare program of the pipefitting industry, state of Washington.

(Exhibit 15 admitted in evidence (tr. p. 405).)

Exhibit 16 is an excise tax return form which I maintained the short time I was in business (tr. pp. 405, 406).

(Exhibit 16 admitted in evidence (tr. p. 406).)

Exhibit 17 is a certified transcript of my labor payroll.

(Exhibit 17 admitted in evidence (tr. p. 406).)

Exhibit 18 contains my signature and Mr. Hopkins'. That is the contract I had with Mr. Hopkins.

(Exhibit 18 admitted in evidence (tr. p. 407).)

Exhibit 19 is a certificate of insurance. [1389]

(Exhibit 19 admitted in evidence (tr. p. 408).)

Exhibit 20 is a receipt for cash in the sum of \$1,500 that I deposited for the bond to go to the Local (tr. p. 409). I got that \$1,500 back (tr. p. 409). They charged me \$18.75 for writing the bond.

(Plaintiff's Exhibit 20 admitted in evidence (tr. p. 410).)

Exhibit 22 is a receipt of Sherwood and Roberts for an insurance premium. It is one of the receipts I received in setting up business (tr. p. 410).

(Exhibit 22 admitted in evidence (tr. p. 411).)

Exhibit 21 is a receipt for the fee that I paid for the bond.

(Exhibit 21 admitted in evidence (tr. p. 411).)

Exhibit 23 is an application for a certificate of registration directed to the Tax Commission of the state of Washington. It is a record I had in my business (tr. p. 412).

(Exhibit 23 admitted in evidence (tr. p. 413).)

Exhibit 25 is a further statement tying in the bond premium with the bond that I acquired from Sherwood and Roberts. It is one of my records (tr. p. 413).

(Exhibit 25 withdrawn (tr. p. 414).)

Exhibit 27 is a return of premium on insurance that I had previously paid Sherwood and Roberts. It is a record I kept.

(Exhibit 27 admitted in evidence (tr. p. 415).)

I obtained the state of Washington contractor's license (tr. p. 416). I don't know whether I have any record of any receipts for any sums paid for that, I might (tr. p. 416). \$8.50 I think is what they cost (tr. p. 417). I obtained the license for the winch

truck. That cost \$27, or \$27.50 (tr. p. 417). [1390] The license for the pickup was \$15 or \$16 (tr. p. 418). I paid \$243 on insurance and got back \$202 (tr. p. 418). And then that's \$18.75 premium for the bond. I never did get none of that back (tr. p. 418). I had the \$1,500 tied up about two months (tr. p. 418). I was in the process of collecting the equipment, material and supplies that I obtained for some time before I actually got my collective bargaining agreement and my contract with Hopkins (tr. p. 418). I worked hard at acquiring these supplies, materials, etc., from around June (tr. p. 418). I would say I put in around 500 hours, something like that, acquiring equipment, supplies and so forth (tr. p. 419). There might be more on the supplies. I thought we were just talking about the hours negotiating business. Just on the acquisition of materials, supplies and equipment might be a little more than that, I really don't know just offhand, but I guess that would be my best estimate (tr. p. 419). I had to drive elsewhere within my home area to make these contacts (tr. p. 420). I would say I drove around 20,000 miles, no, in just talking about obtaining equipment I would say probably around 3 or 4,000 miles (tr. p. 420). I made business contacts in attempting to establish my business (tr. p. 420) so I could obtain sub-work. I contacted contractors (tr. p. 420). I contacted Nicky Crocker, a representative of the Hoffman Company (tr. p. 420). I contacted Buckner in Pasco, a contractor (tr. p. 421). I contacted the Bureau of Reclamation in Ephrata and also in Kennewick (tr. p. 421). I

made contact with Mr. Arndt several times (tr. p. 422). I went to Goldendale and talked to the city council there (tr. p. 422). I talked to Bumpstead and Wilford out of Seattle. I contacted them here in Richland (tr. p. 422). There's more, but I can't think of the names (tr. p. 422). I contacted Kaiser, who was doing work in the Hanford Area (tr. p. 423). That's Kaiser Engineers. I contacted [1391] Blaine Eller of Kaiser. They had a contract in the Hanford Area at that time (tr. p. 423). I would say I put in at least 150 hours contacting these various people (tr. p. 423). I would estimate that I drove 20,000 miles in all of my business (tr. p. 425). Confining my driving to making these contacts I would say approximately 1,000 miles (tr. p. 425). I would say it would run to 50 hours my time spent in union negotiations just to get the collective bargaining agreement, not the time on the men afterwards (tr. p. 425). I would say my time was worth \$5 an hour (tr. p. 427). The traveling I did was in my own car (tr. p. 427). I would imagine the cost of driving my car is ten cents a mile (tr. p. 428). I obtained some payroll checks at the bank and some supplies and materials from the Columbia Basin News including stationery and cards (tr. p. 428). Also made a telephone deposit (tr. p. 428) and paid for power (tr. p. 428). On Exhibit 18 there is a blank on the per cent for overhead and profit. That was never filled in (tr. p. 431). It was supposed to be 25 per cent time and material (tr. p. 431). There is no date on the agreement, Exhibit 18, it was just overlooked (tr. p. 431). It was signed after I got my

agreement with the Local (tr. p. 432). It was signed on the 23rd or 24th or could have been a little later (tr. p. 432). I had an understanding with Mr. Hopkins that there would be no effective contract between the two of us unless I got men from the Local (tr. p. 433). I contemplated going into pipework and fabricating work (tr. pp. 433, 434). That pipe in that work would have been steel pipe (tr. p. 434). In the contacts I have made with various contractors I was able to determine whether or not I would be required in the type of business I contemplated going into, it would be necessary for me to purchase pipe and furnish it in accordance with doing [1392] a job (tr. p. 435). At the time I set up my pipe fabrication and pipe laying and pipe work shop I was going to bid on any pipe fabrication I could get. All the big pipe I would do that on the job site (tr. p. 444). I was figuring on doing fabrication work in my shop, small fabrication in there, or if it was say, 66 inch, and it was in the area, why there would be no use of me doing the fabrication in my shop there, when I would have all that freight to haul it out, so I would do the big pipe in the Area (tr. p. 446). The contract I had with Mr. Hopkins was typical of the type of work I contemplated doing (tr. p. 446). The term "pipe fabrication" means that sometimes you use miters, sometimes you use ells, see, and big pipe like 66-inch, there is no ells for the, you have to make miter cuts, see, in order to make a 90. Fabrication is making a joint or bend in a pipe or flanges. Making a bend is one of the things you do when you

fabricate (tr. p. 446). You might enlarge the pipe or make it smaller or put on a flange or something of that kind (tr. p. 447). There is lots of kinds of fabrication, maybe one hundred (tr. p. 447). I had a system that I worked on, take a piece of plyboard of each size pipe and then you get a center line on a top and on the sides and you just set it over the pipes and mark it on each side and then you've already got your pipe quartered. That is fast, and then you have to taper it so it'll fit right down to the pipe and then you can just mark it up the side and roll your pipe right over and mark that. You've got your miter already made (tr. pp. 447, 448). You would make these particular bends or do this particular work on the pipe either in the shop or out where the job is (tr. p. 448). If you did it in the shop it would be shop welding and if you did it on the job it would be field fabrication (tr. p. 448). I don't know of any non-union labor available in the [1393] Tri-City area during 1954 (tr. pp. 448, 499). I don't know if Mr. Head and Mr. Mokler or Mr. Randolph used non-union labor in 1954. I am sure they didn't though (tr. p. 449). Beames showed me a letter from Head at one time (Tr. p. 451). I was pretty mad at the time but I didn't read it all. He just said that he had that letter from Mr. Head and that he was going to fine him \$250 (tr. p. 452). I saw that letter in Beames' office. I don't know where the letter is now (tr. p. 452). AEC furnished that pipe out there (meaning at Hanford) but I would furnish all the pipe in my shop (tr. p. 453). On any other job I would furnish outside of

the Area, but AEC sometimes they furnish pipe and sometimes they don't (tr. p. 453). All pipe over 24 inch comes from out of the state (tr. p. 454). It is shipped in, I mean you can buy it here in the state, I think, up to 24 inch but nothing larger in the state (tr. p. 454). There is no steel pipe of the type that I contemplated working on manufactured in the state of Washington (tr. p. 454). Some of the suppliers have a small amount of 24 inch on hand that has been shipped in and you can purchase from suppliers (tr. p. 455). I didn't have a typewriter at this place at the airport (tr. p. 460). I didn't have anybody there to answer the telephone at that time (tr. p. 460). At the time the executive board went out there all I had was desk, telephone and renting one welding machine (tr. p. 460). I had made a deal with Mr. Cooney for this one welding machine (tr. p. 461). I knew the executive board had to okay you before you could get an agreement with the Local. That was pursuant to the Local's constitution (tr. p. 464). I don't know when I first talked to Mr. Hopkins about that contract (tr. p. 469). I gave Hopkins a straight bid to start with, I bid the job myself for \$26,251.00. That is what I told Ken, his [1394] superintendent that my bid was, (tr. p. 471). I don't know when I gave that to him (tr. p. 471). This meeting on November 15 was the first meeting that I had presented the executive board with a concrete proposal that they could pass on, yes or no. That is the best I could recall (tr. p. 478). That was a special meeting called at my request (tr. p. 478).

(Exhibit 43 marked for identification (tr. p. 492).)

(Exhibit 43 admitted in evidence (tr. p. 494).)

The contract with the union wasn't signed by me until November 23 (tr. pp. 499, 500). That was Tuesday (tr. p. 500). That's when I told Lawson I would need men in a couple of days, Thursday or Friday, either the 25th or 26th (tr. p. 500). As I went back down to firm up my contract with Hopkins (tr. p. 500). I had to clear with the AEC in order to work on the project (tr. p. 502). I had to show them I had a contract (tr. p. 502). Show them who I was going to work for and what part of the project (tr. p. 502). That is one of the things I had to do after the contract with Hopkins was signed (tr. pp. 503, 504). On the 26th I asked for the dispatch of men. That was a Friday (tr. p. 504). On the 29th, two men were dispatched to me, my brother Alfred and Bill Meler (tr. p. 504). These requirements that were contained there or in the working rules that were given to me by the executive board and the posting of bond, those seemed like regular and reasonable requirements to me (tr. pp. 505, 506). I have been a superintendent and foreman (tr. p. 506). I estimated this bid (tr. p. 506). I was a superintendent for Morrison-Knudson (tr. p. 506). I have been working in the Area, the Hanford Area, off and on since 1948 (tr. p. 510). At one time I approached Mr. Lawson about going into business with me, about a year or a year and half before I went into business [1395] (tr. p. 519). He didn't have any money to go into business (tr. p. 519). He

said it takes some money (tr. p. 519). I don't recall him saying he didn't think I had enough money to go into business. He didn't know how much money I had (tr. p. 519). I could have said when my deposition was taken that it was everybody's opinion that I didn't have enough money. I had to work alone, I had to go it alone (tr. pp. 520, 521). I could have said that Lawson told me that (tr. p. 521). Lawson could have told me I didn't have enough money to go into business. I guess he did (tr. p. 521). I would have done the job in the way Mr. Hopkins directed (tr. p. 537). The method didn't make any difference to me. If he wants to use flanges it makes me more money (tr. p. 537). If Mr. Hopkins wanted me to do it with divers I would have done it that way (tr. p. 538). Thorn and Marble finally did the job, they flanged it up and put it in the river (tr. p. 538). I could have done it just as well as Thorn and Marble (tr. p. 538). I would have done it in the same way (tr. p. 538). I don't know what it cost Thorn and Marble to do the job (tr. p. 538). I was trying to get Mr. Hopkins to do it my way (tr. p. 539). On that job I figured I would clear \$6,000 (tr. p. 539). I could put anything in that Mr. Marble could put in and just as neat or maybe a little neater and just as cheaply (tr. p. 540). The pipe that I have bought I bought from Bumstad and Woolford, a Seattle company (tr. p. 540). And the pipe was on the project when I bought it (tr. pp. 540, 541). I never submitted a bid to the Hoffman Company (tr. p. 544). I think he asked me for a bid once but I didn't have an agreement with the Local (tr. p. 544). That was

for a pipeline in Pendleton, Oregon (tr. p. 545). Twin City Construction Company didn't have any work at the time I talked to them (tr. p. 546). [1396]

The Bureau of Reclamation didn't ask me to submit a bid, they didn't have anything going at that time. They told me about a line that was going to come up (tr. p. 546). Hopkins asked me to submit a bid on another job (tr. p. 546). I wasn't asked to bid by Buckman or Kaiser or on the job at Umatilla (tr. p. 547). I didn't submit a bid at Goldendale (tr. p. 548). I didn't submit a bid to Barton at Sunnyside (tr. p. 548). I got a dispatch from the union hall to work for Kaiser Company after this, I think somewhere in January, it could have been December 28th (tr. p. 556). I had worked for Blaw-Knox before I quit in October or November, I worked for them approximately six months (tr. p. 556). I worked for Blaw-Knox twice during 1954 (tr. p. 557). I was welding superintendent for Kaiser for awhile and then I was welder for them later (tr. p. 557). I was getting paid a general foreman's wages at Kaiser. They was figuring on setting up a superintendent. I never did get to be a superintendent (tr. p. 558). Meler said the union pulled him off my job (tr. 565, 566). This pipe that I got from Bumstad and Woolford, Wooten got half the pipe. I sold the pipe and I paid him for his half. At that time I didn't have enough money to pay for the pipe so I had enough to pay for half of it and I told him if he wanted to go in with me on the pipe that he was building a house, too. The pipe cost \$300. I put in \$150, I got \$150 from

Wooten (tr. p. 570). When I later sold the pipe I believe I gave Wooten \$250 (tr. p. 571). I put in around 40 hours getting the pipe out (tr. pp. 571, 572). I drove approximately 400 miles, maybe a little more (tr. p. 572). Prior to 1954 I had a pipe fabricating shop of my own in Borger, Texas (tr. p. 573). I was in business there six, seven months (tr. p. 573). And another time I bid jobs in Fort Worth (tr. p. 573). [1397]

Exhibits 48 and 49 purport to be receipts for funds received on a welding machine (tr. p. 576). Exhibit 48 shows the first payment some time around the first of October and exhibit 49 is when I got the balance paid off.

(Exhibits 48 and 49 admitted (tr. pp. 576, 577).)

End of testimony of Dillion (tr. p. 590).

Testimony of Robert E. Randolph (tr. p. 590).

My name is Robert E. Randolph (tr. p. 590). I am one of the defendants in this case. My business is plumbing and heating (tr. p. 591). We work on all sizes of pipe. We are equipped to do all sizes (tr. p. 591). I've been in business in Pasco six years (tr. p. 591). I don't believe there is any steel pipe manufactured in the state of Washington. I haven't purchased any steel pipe that has been manufactured in the state of Washington (tr. p. 592). I have been introduced to Mr. Dillion (tr. p. 593). I met Mr. Dillion at the office of the local union in Pasco (tr. p. 594). That is the first that I knew anything about his shop (tr. p. 594).

I recall attending the meeting that Mr. Head testified to, that is referred to as the joint meeting of the joint conference board and the executive board (tr. p. 594). Dillion acquainted me with the fact that he was in the process of setting up shop (tr. pp. 594, 595). The meeting was November 29th. I learned of it that day (tr. p. 595). Mr. Head called me and suggested calling a meeting. I believe I called Mr. Mokler (tr. p. 595). We always have our meetings at the union hall (tr. p. 597). There is three master plumbers on the joint conference board. I was a member of the joint conference board at that time (tr. p. 597). The joint conference board is made up of three members of management, three members of labor, to discuss problems that come up between management and labor to iron it out (tr. p. 598). [1398] This is an informal organization (tr. p. 599). There is a statewide association (tr. p. 599). I was attending this meeting as a representative of the master plumbers (tr. p. 599). Mr. Head was a member of the group at this time (tr. p. 600). I called Mr. Mokler (tr. p. 600). Mr. Free-low, I could not get him, he was out of town (tr. p. 600). Mokler came to pinch-hit for somebody else (tr. p. 601). I told him the meeting was for a clarification of the agreement between Dillion and the union (tr. p. 601). We hadn't had these meetings very often. I think the last one before this one was during the year of 1953 (tr. p. 607). I have never employed non-union pipefitters or welders (tr. p. 607). I don't recall discussing this meeting with Mr. Lambert after the meeting (tr. p. 607).

Plaintiff's Exhibit 50 marked for identification (tr. p. 613).

That is my signature (tr. p. 613).

(Exhibit 50 admitted (tr. p. 614).)

The type of cases that come before the joint conference board, for example are overtime disputes or travel time disputes (tr. p. 615). I've never been a member of the state joint conference board (tr. p. 616). At this meeting of the joint conference board Mr. Dillion was asked to leave the room (tr. p. 618).

End of testimony of Randolph (tr. p. 619).

Testimony of Lewis Hopkins (tr. p. 620).

My name is Lewis Hopkins, I am a general contractor (tr. p. 620). My place of business is Pasco, Washington (tr. pp. 620, 621). I have been engaged in this business in Pasco about six years (tr. p. 621). I have occasion to bid on jobs involving the laying of pipe. Concrete pipe we lay ourselves, steel pipe normally we sub-contract (tr. p. 621). Sub-contractor generally [1399] obtains the pipe (tr. p. 622). There is no steel pipe manufactured in the state of Washington to my knowledge (tr. p. 622). If there is any necessity to fabricate any of this pipe, that is to make bends or closures on the ends of it or anything of that type it is generally done in the field (tr. p. 622). I have done jobs for the Bureau of Reclamation (tr. p. 622). I have never put in any steel pipes (tr. p. 623). I have pur-

chased from manufacturers in my business. I have purchased from Armco in Portland (tr. p. 624). I don't know of any metal pipe manufacturers in the state of Washington (tr. p. 625). I am acquainted with Mr. Dillion. I first became acquainted with him in the fall of 1954. I entered into a contract with him in the fall of 1954 (tr. p. 625). That is my signature on plaintiff's exhibit 18 (tr. p. 625). I had conversations with Mr. Head during the fall of 1954 regarding Mr. Dillion's contract with me (tr. p. 626). I would presume these conversations were in November on the telephone (tr. p. 626). I discussed Dillion's contracted job with Beames or Cape in October (tr. p. 627). Exhibit 52 is correspondence I received from the AEC regarding my contract on the outfall structure that I ultimately contracted with Dillion.

(Exhibit 52 offered in evidence (tr. p. 628).)

(Exhibit 52 withdrawn (tr. p. 629).)

I talked with Beames first (tr. p. 630). I was notified in October of 1954 that we were the low bidder. This was confirmed on November 17 (tr. p. 630). The first conversation I had with Mr. Beames was an attempt to verify the existence of an agreement between Mr. Dillion and the union. I understood that he had one (tr. p. 630). I don't believe I had any more conversations with Mr. Beames (tr. p. 630). I don't believe I had any conversation with Mr. Cape (tr. p. 631). [1400] Prior to the taking of my deposition I had been in conversation with at-

torneys for the defendant and had furnished them with certain of my records (tr. p. 632). Since being subpoenaed for this trial I have been in contact with the attorneys for the defendants (tr. pp. 632, 633). Head gave me a bid on the same project, but the scope and type of work Head would have done are entirely different (tr. p. 635). I received a bid from Mr. Head (tr. p. 637). There was a difference in the scope and manner of work contemplated by Mr. Head's bid and what Mr. Dillion did (tr. p. 637). It was a difference over the matter of method of placing the pipe in this river (tr. p. 637). The end product is the same, the end result is the same (tr. p. 637). Basically, our problem was to place about 500 feet of 66-inch steel pipe in the Columbia River and the conventional method of doing it is to build a big earth dike out into the river, put a drag line, excavating equipment, on the dike, dig a trench and pump the water out and set the pipe and then remove the dike, and that is the way it has been done in previous jobs. (tr. pp. 637, 638).

On one occasion there was an attempt made to float the pipe out into position and then sink it, which was the method that Head felt was advisable. (tr. p. 638).

So we had a different idea on it. We were going to assemble the pipe in 150-foot joints, take it out with a big dredge crane, which had previously dug the trench, place the pipe in the trench and connect the joints by using a diver which we felt would be a less expensive way of accomplishing the job

and as it turned out, it was (tr. pp. 637, 638). Mr. Dillion would have done it the way we actually did do it, sub-assemble the pipe and place it, and Head would have tried to float it, I believe, was his idea (tr. p. 638). [1401] There were no other essential differences (tr. p. 638). I discussed with Mr. Dillion the manner of putting the pipe down the river (tr. p. 638). I believe Head's bid was something like \$30,000 (tr. p. 639).

(Plaintiff's Exhibit 53 marked for identification (tr. p. 640).

That is a letter prepared in my office (tr. p. 640). I am sure I gave Dillion notice he was to perform by a certain date. Speed is the most important thing on the job (tr. p. 641).

(Exhibit 53 admitted in evidence (tr. p. 641).)

I gave Dillion verbal notice regarding completion of the job (tr. p. 641). The nature of the notice was that he would have to get more men on the job or we would have to take the job away from him. I gave him that notice probably shortly before that letter (meaning exhibit 53) was written (tr. p. 642). Exhibit 53 was dated December 4, 1954 (tr. p. 643). I paid Dillion for his expenses incurred out there. Exhibit 32 is one of our vouchers. It was for payment in full of work performed on outfall structure and that particular check was to Dillion. I believe that covered his direct wages and expenses in connection with the work he had performed on the subcontract (tr. p. 643). In addition to the written

agreement, we had an additional agreement that we would pay him A.E.D. rental rates on any equipment he furnished on the job (tr. p. 644). Thorn and Marble ultimately did this work for me (tr. p. 644). I had the same arrangement with them to pay them rental rates on any equipment (tr. p. 644). If we had to furnish additional equipment they would pay us and as a matter of fact they did (tr. p. 644). I paid them according to the invoices they furnished us (tr. p. 644, 645). I believe we rented them while on the job a crane and various [1402] smaller items. I doubt if our records show that, but I don't know (tr. p. 645). We would pay them rental on our welding machines (tr. p. 645). This contract of Mr. Dillion's covered work of welding of steel pipe primarily. It did not cover the placing of the pipe (tr. p. 646). Mr. Dillion unloaded a car of steel, either unloaded it off the car or loaded onto our truck, I don't know for sure (tr. p. 646). He furnished them men that handled that (tr. p. 646). His contract covered not only the welding, it also covered the handling of the pipes from the track down on the job. Anything under the scope of work that was normally done by mechanical contractor (tr. p. 647). Thorn and Marble did that (tr. p. 647). Thorn and Marble placed pipe in line on the job (tr. p. 647). They took pipe from a place where it was by the railroad, they furnished the riggers, men that handled the crane rigging with pipefitters on the payroll of Thorn and Marble (tr. p. 647, 648). Exhibit 54 is the file that I kept in my business and

had correspondence with Thorn and Marble (tr. pp. 648, 649).

(Exhibit 54 admitted in evidence (tr. p. 649).)

I informed the AEC that I had a contract with Mr. Dillion (tr. p. 649). I don't know when that was (tr. p. 650). Exhibit 55 is a construction status chart that I prepared on the job that we have been discussing here. It was prepared on November 16, 1954 (tr. p. 650).

(Exhibit 55 admitted in evidence (tr. p. 651).)

In my construction status chart, there is an item designated as assembled welded pipe with an estimated cost figure. Mr. Dillion was to do this (tr. pp. 651, 652). There is also an item, number 7, place welded steel pipe. Under our dealings with Mr. Dillion we were to do that (tr. p. 652). I had discussed with Mr. Dillion the matter of means of [1403] placing the pipe. As general contractors, we dictate how the job is done. Mechanical and the other sub-contractors do it the way they are told to do it under normal conditions (tr. p. 653). The AEC let the bids to put this pipe in the river and all they were interested in was that it was put in according to their specifications (tr. p. 653). They didn't specify the method at all (tr. p. 654). The AEC granted us permission to use welded steel flanges at 150-foot intervals which was not on the original contract drawings. However, it doesn't represent a radical change because it is simply a difference in the method of accomplishing the same purpose (tr. p. 654). They had a meeting with me to discuss the change (tr. p. 655).

(Plaintiff's Exhibit No. 56 marked for identification and withdrawn (tr. p. 655).)

I don't believe there had been any approval by the AEC to the job out there using flanges rather than the other method of putting the pipe out (tr. p. 656). I think the total amount I paid to Thorn and Marble was around \$13,700—559, although I couldn't be sure (tr. p. 657). My independent recollection of the total amount which I paid corresponds with the total figures shown on exhibit 54 (tr. p. 657). Mr. Dillion never submitted a lump sum bid that I recall (tr. p. 657). The pipe I referred to that I purchased from Arco Company in Portland was corrugated culvert pipe primarily (tr. p. 657). It is not steel pipe in the trade name, it is made of steel but it is ditch pipe (tr. p. 657). Laborers install corrugated culvert pipe as distinguished from plumbers and steamfitters (tr. p. 657, 658). Mr. Head had planned to do all the pipe moving and handling himself (tr. p. 658). He planned to do some work and furnish some equipment which I eventually performed myself (tr. pp. 658, 659). [1404] There was some risk from the contractor's point of view in adopting the method which I devised to place this pipe (tr. p. 659), that is risk from the cost point of view (tr. p. 659). Insofar as installing similar projects on the Hanford Area, my method was a new method (tr. p. 659). It turned out to be cheaper than the conventional method (tr. p. 660). My method required more speed in getting the work done because we were

dependent on low water in the river. We couldn't wait for the spring floods (tr. p. 660). When Thorn and Marble took over the job they did do the same work in the same way as I contemplated it was to be done by Mr. Dillion (tr. p. 660). They didn't do substantially any additional work or any less work (tr. p. 660). I don't recall begging Dillion to take any work (tr. p. 660). I had some discussions with him about some other job. I think we discussed gas lines. I didn't eventually do any of that work myself (tr. p. 660). At the time I employed Thorn and Marble they had other mechanical work on the Hanford Project and had other work for me at that time (tr. p. 661). I think they had two jobs (tr. p. 661). The fact that they had other work and the fact that I knew they might use some of the welders employed on this other work had something to do with selecting Thorn and Marble to complete that job (tr. p. 661). I contemplated that if there were a shortage of welders Thorn and Marble might take some from one job and put them over to this job, that I was in a hurry to finish (tr. p. 651). My recollection of the overhead and profit figure which we agreed to be inserted in the blank space on exhibit 18 was 15 per cent (tr. p. 662). This letter, plaintiff's exhibit 53, I believe was returned unopened (tr. pp. 662, 663). Sometimes the practice for us to lump the overhead and profit together and simply provide that the mechanical subcontractor will receive the cost plus the figure which covers [1405] both overhead and profit (tr. p. 664). In those situations the overhead portion of the

figure is intended to cover his office nonproductive help, depreciation, repairs, maintenance on equipment and so forth (tr. p. 665).

(End of testimony of Hopkins (tr. p. 667).)

(Testimony of Marion Morris (tr. p. 667).)

My name is Marion Morris, I am commonly referred to as Blackie (tr. p. 667.) In 1954, I was a member of the executive board of Local 598 (tr. p. 668). I know Mr. Dillion (tr. p. 668). I first met him in 1949. I got pretty well acquainted with him in 1953 and he was a neighbor of mine in 1953 and 1954 (tr. p. 669). He moved in about a block from me in 1953 and he lived there up until the middle of, possibly the first part of the year, 1954 (tr. p. 669). We were good friends (tr. p. 669). In April of 1954 was the first time I had any inkling he was going to start in the pipe business (tr. p. 670). Dillion appeared before the executive board several times in 1954. The first time was some time during the summer, I believe it was along in July (tr. p. 670). At that first time Dillion appeared at the executive board meeting in July of '54, it didn't amount to too much, he just came in and wanted to know what the specifications were for him to start in business. We gave him a copy of the Washington State Agreement and told him what it would have to be as far as we were concerned (tr. p. 671). At that time he indicated he wanted to go in the pipe business (tr. p. 671). I believe he next appeared before the executive board in November some time (tr. p. 672). On

September 7, 1954, referring to the minutes of the executive board meeting, I would say that was the first time he came to tell us where he thought he wanted to put a shop. As near as my recollection recalls, it was Enterprise. Enterprise is now called West Richland (tr. p. 673.) [1406] The meeting of November 15 was a special meeting (tr. p. 676.) At that time Dillion had given up on putting in a shop at Enterprise or at the Y because it wasn't suitable and he had went out and found another shop out at the airport and we, the exeuctive board, went out and examined the shop, but I can't get the dates right. I don't know whether it was this night or some other night, but I know it wasn't a regular meeting night and I think it was on a Monday (tr. p. 676.) On the 15th of November, I believe was the night he came in and we told him he would have to have a \$1,500 labor bond. He handed us \$1,500 cash and laid it on the table. We wouldn't accept it. We. wouldn't be responsible for \$1,500, we told him it would have to be a bond. I believe there had been some discussion of a bond before this (tr. p. 677). We wanted a labor bond put up there and let him run, or he could run a certain length of time. To see that that payroll was met. That was the idea of the labor bond (tr. p. 680.) I am still a member of Local 598 and have continuously been a member since (tr. p. 681.) Local 598 is an unincorporated association and a defendant in this action (tr. p. 682), and I am a member (tr. p. 682). On the 16th of November, I remember, we left a notice on the desk for the business—I don't know whether it was this meet-

ing or not that we left a notice on the business manager's desk to investigate Dillion and decide whether he was eligible for a Washington State Agreement (tr. pp. 682, 683). Lawson appeared at this meeting. I think Mr. Beames was out at that time, was away from town, and Mr. Lawson was conducting the business. I think this was the night Dillion brought him up there to the meeting (tr. p. 683).

Plaintiff's Exhibit 57, the minutes of the meetings of the executive board on September 7, November 15, November 16, November 22, marked for identification and admitted in evidence (tr. p. 686). [1407] I remember Dillion coming back on the night of the 16th of November, and giving us a list of what he had and the site of his shop and said he could get more backing, I remember that (tr. p. 689). He had something that proved that he had a lease on that building. I can't tell you right now just what it was, whether it was the lease or a receipt, but it was satisfactory to the executive board (tr. p. 689). According to the minutes also, he was instructed to bring back a \$1,500 labor bond. He brought back a labor bond but I didn't examine it (tr. p. 689). I saw Dillion's equipment but I couldn't tell you, I believe it was the 15th, we went out and checked his shop (tr. p. 698.) I checked his equipment but I can't tell you the date (tr. p. 690, 691). I was aware of the equipment he had at home. He wanted me to come over and check it because I was the closest member of the executive board that lived to him (tr. p. 691). The equipment that he had at home—he had two welding machines, he had a truck

and a winch for it, and he had a welding bench, steel welding bench, with two vises on it and he had hand tools. I couldn't tell you exactly how many he had, but I know he had hand tools. He had a lot of torches, several gages, I would say quite a bit of hose. He had a lot of pipe. That is not equipment, but he had a lot of pipe (tr. p. 691). I don't remember whether he had skids or not (tr. p. 692.) I think November 29 was the special meeting of the executive board and joint conference board together. There were no minutes kept of this meeting that I can recollect (tr. p. 694.) I was in attendance. The others in attendance were the members of the executive board, Mr. Head and Mr. Mokler and Mr. Randolph (tr. p. 694). Mr. Barrett, Mr. Kuntz, Mr. Carver (tr. pp. 694, 695). Dillion was there (tr. p. 695). He came in the meeting (tr. p. 695) when it started. He was asked [1408] to leave (tr. p. 695). Mr. Head requested him to leave (tr. p. 696). Mr. Head started in on the executive board. He said why did you guys give this guy a Washington State Agreement, that's the way it opened (tr. p. 696). We told him we didn't give no agreement but we recommended he should have an agreement and it was concurred in by the body (tr. p. 696). Head said something about Dillion getting men. He said he didn't get the job. He said it was bid under me. He said "I don't want the damn job," and he said "I'll go to hell before Dillion mans that job." I don't recall Mr. Mokler or Mr. Randolph saying anything (tr. p. 697). Head did most of the talking (tr. p. 697).

(End of testimony of Mr. Morris.)

(Testimony of J. L. Mokler (tr. p. 709).)

My name is J. L. Mokler. I recall a meeting between the masters and the executive board of Local 598 which is purported to have taken place on the 29th day of November (tr. p. 709). Mr. Randolph, Mr. Head and the only one I knew on labor was Whitey Carver and myself (tr. pp. 709, 710). There was probably eight or ten more in attendance (tr. p. 710.) I don't know Mr. Fuqua. I don't know Mr. Lambert. Mr. Dillion was there. He did not stay during the meeting. He was asked to leave. I don't know who asked him to leave (tr. p. 710). Mr. Randolph called me in the afternoon and said there was a meeting to be held that evening (tr. p. 710.) Mr. Randolph said there was some kind of an agreement, either signed or going to be signed, some kind of a special agreement that Mr. Dillion was going to get, and he thought we should examine the agreement to see whether it was detrimental to us or whether it was a straight agreement or what it was (tr. p. 711.) There seems to be a lot of discrepancy about who was in charge of the [1409] meeting. Mr. Randolph was acting chairman of the board. I had resigned from the board, and in fact, I had been acting chairman. They asked me to be acting chairman that evening and I did, I acted as chairman (tr. p. 711). I'm talking about the joint conference board. This was a meeting between the joint conference board and the executive board of Local 598 (tr. p. 712). I had resigned from the joint conference in the latter part of 1953 (tr. p. 712). When I said I acted as chair-

man, I meant I was acting as chairman of our group (tr. p. 712). They asked me to fill in for the board because they couldn't find anyone else in town to come over (tr. p. 713). Mr. Randolph asked me (tr. p. 713). There isn't any record made of who the members of the joint conference board are. There were no minutes kept of this meeting. My place of business is in Kennewick, Washington (tr. p. 715). I don't do any pipeline work. We operate fabrication only for our own use (tr. p. 716). We went over to the meeting to find out what the agreement with Mr. Dillion was and someone asked to have the agreement brought in and read. Who read it I don't remember (tr. pp. 716, 717). Someone on labor read it. I don't think it was in our group that read (tr. p. 717). We mulled it over and decided that there was nothing in it that would be detrimental to our work and there was nothing in there to give them any better labor conditions than we had in the regular agreement (tr. p. 717). I think I said after the meeting and after reading the agreement we didn't see why we had any business over there at all (tr. p. 717). I don't remember anything said by Mr. Randolph or Mr. Head during or after the meeting (tr. pp. 717, 718). If there was any dispute it was between Mr. Dillion and the union (tr. pp. 720, 721).

(End of testimony of J. L. Mokler (tr. p. 721).) [1410]

(Testimony of Will Lawson (tr. p. 734).)

My name is W. I. Lawson (tr. p. 734). I am assistant business agent of Local 598. I have held this position a little over four years (tr. p. 735). Prior to that I worked for Atkinson-Jones and Urban Smythe out in the Atomic Energy Commission Area (tr. p. 735). They are large mechanical contractors (tr. p. 735). I was not elected assistant business agent, I was hired. Mr. Beames hired me. I was approved by the executive board and also the body (tr. p. 736). The other representative is Woodrow Cape (tr. p. 736). Both Mr. Cape and myself are defendants in this action (tr. p. 737). Cape was appointed approximately a year after I was (tr. p. 737). I wasn't an elected officer of the local during 1954 but the local did approve my appointment (tr. p. 737). I first met Mr. Dillion, the plaintiff in this action about 1947 (tr. p. 737). During 1954 I had discussions with Mr. Dillion concerning Mr. Dillion's desire to go into the pipe fabricating business. I couldn't give you a date on that because it was, I'll say over a period of a year off and on. It came up just in some conversation or something like that. These discussions took place at the house or wherever I run into him (tr. p. 738). The area that I served principally during 1954 was four counties in Eastern Oregon and Walla Walla County in Washington. In Mr. Beames' absence, I also worked around the union hall (tr. p. 739). I didn't have Franklin or Benton County at that time, that was not part of my territory (tr. p. 740). Sometimes I was doing

Mr. Beames' job in Mr. Beames' absence during 1954 (tr. p. 740). Some time in November of 1954, Beames was down at Tulsa, Oklahoma, or I don't know what date (tr. p. 740). My job, I just try to find out what jobs are going on, if there are any new ones started whether they are union jobs or whether they are not (tr. pp. 740, 741). [1411] My territory extends as far south as LeGrande (tr. p. 741). There are industrial pipelines running through my territory. The major portion of the industrial piping that is done and has been brought into this area runs through my territory. I have jurisdiction over the pipelines from Ontario, Oregon (tr. p. 741). It has been my experience during the last five years to assign men to jobs on pipelines and plumbing in that general area (tr. p. 741). I tell the girls who to dispatch and they usually write the dispatches out, but on these pipelines that come through, I done most of that dispatching myself (tr. pp. 741, 742). To a certain extent it is the business agent's job to either dispatch or tell the girls who to dispatch (tr. p. 742). Sometimes I have authority to dispatch men out of the Pasco Local office, any time that Mr. Beames was out and asked me to dispatch men to such-and-such a job, I usually did (tr. p. 743). I undoubtedly dispatched men in the month of November, 1954 (tr. p. 743). I have an idea I dispatched men to jobs in the Tri-City area (tr. p. 744). I did not have to get the approval of any member of the executive board to dispatch men (tr. p. 744). I have not at any time gotten approval of the executive board before dispatching men (tr. p. 744). I have never been re-

buked by the executive board as a body for having dispatched certain men to certain jobs (tr. p. 744). I was asked by Mr. Dillion and went down with Mr. Dillion to the executive board meeting at 11:00 o'clock one night. At that meeting I was instructed by the executive board to get a workable agreement from the Washington State agreement that we could give Mr. Dillion to open a pipe fabricating and welding shop (tr. p. 746). The date I can't remember. After looking at the minutes of the meeting I am pretty sure it was November 22 (tr. p. 747). [1412] No, it was the 16th they called me down there because that is the only meeting that I was called to (tr. p. 748). They were fixing to sign him up to a Washington state agreement when Mr. Dillion came out and got me to come down to the meeting with him to help him. The executive board didn't tell me to sign that agreement. Not that one, because he couldn't sign a Washington state agreement (tr. p. 748). They asked me could I prepare and put into force an agreement for Mr. Dillion. I told them no, I would have to get the lawyer to do it (tr. p. 748). The lawyer was out of town (tr. p. 749). The following day Dillion called me and asked me to meet him over there and Mr. Molthan wrote out something in longhand and I believe we took that longhand draft over to Miss Cameron and it was typed up and signed maybe a couple of days later (tr. p. 749). I was out of town in that period when they was writing them up, writing the minutes up, I was out of town that day. After we brought them over and turned them over to them I had to go to LeGrande,

somewhere over there, and when I got back the agreement was wrote up and I signed it. If the agreement shows on its face that it was signed on the 22nd, I would say that was the date I signed it (tr. p. 750). I don't remember the day Mr. Beames came back from Tulsa (tr. p. 750). He could have been back on the 17th, but I don't think so (tr. p. 750). I don't recall whether I was in town on the 18th (tr. p. 750). Mr. Head and Mr. Beames went to lunch together immediately after Mr. Beames returned from Tulsa. It is nothing unusual for them to go to lunch together (tr. p. 751). I was acquainted to a certain extent with the type of records that were kept in Local 598 in 1954 (tr. p. 751). As to available men, we got a card system. It was all on the card system (tr. pp. 751, 752). Those cards are work record cards that is kept on each man (tr. p. 752). [1413] They have cards shows when a man comes in off the job when they check in and tell us (tr. p. 752). There was no special list of available men kept in the office of Local 598 during the fall of 1954 (tr. p. 755). I could go right down the card file there any time I wanted to see who was out of work and who wasn't (tr. p. 755). All I would have to do is pull out the whole list of cards and go right down it. The date is on there when they terminated (tr. p. 755). In November of 1954, there was around 2 or 3,000 active cards (tr. p. 756). If a contractor called in and said I wanted three men I could go to the card file and pull any of them out as long as they had them set up the way they have them set up. We

had them alphabetically formed right down the line and the ones that had been out the longest is usually the ones we put back to work (tr. pp. 756, 757). There are 75 or 100 cards in each little file and all you have to do is flip right through them like going through a book and find some man whose card indicated he was out of work. The dates is on them. There is lots of them that never come in, maybe they're three or four weeks coming telling you they are terminated (tr. p. 757). They come and talk to me, the girls, anybody that is there (tr. p. 757).

(Plaintiff's Exhibit 58 marked for identification (tr. p. 758).)

That is a work card, one that was set up in the office. That is the type of card we were discussing a minute ago (tr. p. 758). This is the card that indicates when the man is assigned to a job and when he comes off of a job (tr. p. 758). Like this, V. Q., voluntary quit, on 8-27-54 (tr. p. 758).

(Plaintiff's Exhibit 58 admitted in evidence (tr. p. 759).)

There were quite a few of these cards in our files [1414] in November, 1954 (tr. p. 759). I believe it exceeded 2,000 (tr. p. 760). It is a history card (tr. p. 760). I would go through the cards for information that are available (tr. pp. 760, 761). I wouldn't necessarily go through all 2,000 (tr. p. 761). We got an out-of-work file. Their cards are put in a special file (tr. p. 761). I think we had pretty near all the men working along about No-

vember 23, 1954 (tr. p. 761). I wasn't too much acquainted with the Kaiser job on the Hanford Project (tr. p. 761). Everybody that I have working over in the state of Oregon has to be Oregon certified (tr. p. 761). Welders and plumbers have to have a license in the state of Oregon to operate, so I don't have too much trouble with them over there because I know who is whose (tr. p. 762). It is just a difference in the laws of the states (tr. p. 762). I don't think I ever visited the Kaiser job but just one time (tr. p. 762). I don't know when and I couldn't tell you even what I went out there for (tr. p. 763). With regard to the number of pipe welders they were hiring in November or December of 1954, I couldn't tell you how many of them there were. They had a slough of them (tr. p. 763). I couldn't tell you whether they were hiring them because I don't know (tr. p. 763). I couldn't say whether it is or is not a fact that Kaiser was laying off black iron welders because any company out there usually holds the welders until the last, for some cause or other (tr. p. 763). I don't know whether Kaiser was laying off welders or not (tr. p. 763). I had opportunity to examine pipe used by contractors with whom we were dealing. I checked the pipe to see if it had a union label on it (tr. p. 764). I never know just where the pipe comes from (tr. p. 765). I was acting business agent of Local 598 in Mr. Beames' absence while he was gone to Tulsa during November of 1954 (tr. p. 765). [1415] I have testified that I attended a meeting of the executive board with Mr. Dillion the 16th of November, if that is the date (tr. p. 766).

Before I went to the executive board I knew Dillion was trying to get a job from Hopkins. I didn't know what kind of a job it was (tr. p. 766). I didn't know it was an outfall structure (tr. pp. 766, 767). Before I went to the executive board on the 16th, Dillion told me he was going to do fabricating pipe and fabricating business (tr. p. 767). He didn't discuss the details of the Hopkins' contract with me (tr. p. 767). Before I became business agent I had worked on the Hanford Project and I had worked on an outfall structure (tr. p. 767). From what I understand, it was similar to the structure that Mr. Dillion was going to build for Mr. Hopkins (tr. p. 768). I discussed my experiences on the outfall structure with Mr. Dillion and most everybody had talked to me about it (tr. p. 768). I could have discussed with Mr. Dillion the manner in which the job should be performed and the problems that I had seen encountered on the previous jobs (tr. p. 768). I stated that the executive board told me on the 16th, to give Mr. Dillion some kind of workable agreement (tr. pp. 768, 769). By workable agreement I understood Mr. Dillion was asking for pipeline and fabricating welding shop (tr. p. 769). I know the type of men it takes to put one of these outfall structures in, I think (tr. pp. 769, 770). I was called from Mr. Molthan's office by Mr. Dillion the day after Dillion had carried me in to the board. That is when I went to Mr. Molthan's office to discuss the agreement with him and I helped Mr. Molthan to work out this workable agreement, Mr. Dillion and myself did (tr. p. 771). I have worked with this type of an out-

fall structure a couple or three years before (tr. p. 771).

(Exhibit 59 marked for identification (tr. p. 781).) [1416]

Exhibit 59 is a national agreement, lists the type of national agreements. It is a booklet published by Headquarters of the International (tr. p. 782).

(Exhibit 59, admitted in evidence (tr. p. 783).)

Hanford Addendum was simply a contract where a few of the contractors and the union officials agreed with the atomic energy commission as to certain labor standards that would be maintained by the pipefitting industry on the Hanford Project (tr. p. 798). When a man went on the Hanford Project he agreed to abide by the Hanford Addendum simply by referring to the Hanford Addendum in his contract with the AEC (tr. p. 798). A sub-contractor like Mr. Dillion wouldn't actually have signed the Hanford Addendum (tr. p. 798). I never did see Mr. Dillion's shop (tr. p. 802). I couldn't say off-hand whether there were any welders hanging around the hall for as long as two days in a row in the last 15 days of November, 1954 (tr. p. 804).

(Exhibit 60 marked for identification, tr. p. 809).

This appears to be the card of Roy J. Smith (tr. p. 809).

(Exhibit 60 admitted in evidence (tr. p. 811).)

(End of Lawson testimony (tr. p. 816).)

(Mokler recalled (tr. p. 816).)

It is possible I made objection to any of the statements made by Mr. Head during the meeting of the joint conference board, but I don't remember any (tr. p. 817). I didn't hear Mr. Randolph make any objections (tr. p. 817).

(End of testimony of Mr. Mokler, tr. p. 819).

(Testimony of Richard C. Lambert, tr. p. 819).

My name is Richard C. Lambert (tr. p. 819). I am acquainted with Mr. Dillion (tr. pp. 819, 820). I first met Mr. Dillion about four years ago on the Armand-Jeffries job at [1417] North Richland (tr. p. 820). I knew him during the fall of 1954. He appeared before the board. I was on the executive board and I was a member of the executive board (tr. p. 820). We were casual acquaintances in the fall of '54. I have become better acquainted with him since that time (tr. p. 820). I attended a meeting during the month of November, 1954, when Mr. Head and Mr. Mokler and Mr. Randolph also attended (tr. p. 821) and the representatives of the union joint conference board were in attendance. That meeting took place at the office of Local 598 (tr. p. 821). The thing that stands out in my mind as to what occurred that night is Joe Head rose and wanted to know what the object was of giving Dillion an agreement, such an agreement, and who in the h--l gave him the agreement (tr. p. 822). Mr. Dillion was asked to retire to the other room. He was in the meeting when it first started (tr. p. 822). Mr. Head also said he would see him in h--l before he'd see Dillion do the

job, the particular job. He also wanted to know who gave the agreement and to confirm that he made a telephone call and called the Local attorney and as I recall it, he got a little rough with the attorney and he turned and said, "He may know the legal end of it but he doesn't know what we contractors have to go through" (tr. p. 822). Also on the telephone conversation he asked about the agreement, if he (meaning the attorney) wrote the agreement and said, "What the h--l do you want to do that for?" That is as much as I can remember (tr. p. 823). The job that was identified was the Lew Hopkins job. Head said that Dillion had the job before he received the agreement (tr. p. 823). Joe (Head) threatened to sue the local and sue Lew Hopkins and fine Rudell Beames \$250 and brother Carver, a member of the labor side told him well, he had better go through the right channel. Joe said, "That I will do, I will do" (tr. pp. 823, 824). [1418] I told them since there was such a commotion being raised about this contract it certainly was evident that it wasn't satisfactory. The only contract that I would be familiar with would be a Washington state agreement (tr. p. 826). At the close of the meeting, the executive board left a little notation to be left on the desk that we believed the job should be manned, I mean the business agent's desk (tr. p. 826). I don't recall anything further about the meetings outside of Mr. Lawson was called in and we called Mr. Lawson in to verify how the agreement was brought about for Mr. Dillion, and Mr. Lawson had took it upon himself to assure us that

he believed he could give Mr. Dillion a satisfactory agreement. There was a lot of turmoil there, a lot of discussion. The meeting lasted about an hour and a half (tr. p. 827). I was working for Randolph and Taylor at the time and there was a little note on my card when I came in that evening indicating that it was imperative that I be at the union hall at 7:00 o'clock that night. I didn't know the purpose of the meeting before attending (tr. p. 827). I was in attendance at the meeting of the executive board meeting on the 15th of November (tr. p. 829). That is the first time that I was present at a meeting when Mr. Dillion came before the board for an agreement (tr. p. 829). Dillion said he had talked to the business agent about an agreement and that he had a place at West Richland, but that wasn't satisfactory, but he stated that he had a new location in Pasco which was now agreeable, which would be agreeable with the business agent. He wanted the board to agree to give him an agreement (tr. pp. 829, 830). We told him what he would have to do in order to qualify to get the agreement. He would be required to have tools, telephone, a building that is facing a street, and a bond. We discussed with him the purpose of the bond to assure the payroll (tr. p. 830). [1419] On the 15th Mr. Dillion was asked to bring in his bond proof and his financial report (tr. p. 833). I looked at Mr. Dillion's shop. The executive board did. I believe that was on the 16th. We went out and looked over Mr. Dillion's shop at the airport. There were

several welding machines in there. He explained to us that he was renting one of them and all the switchboxes and the pre-fabrication table and tools that he showed us (tr. p. 833). Dillion attended with us at the time we looked his shop over (tr. p. 833). He informed us of other equipment, supplies, tools and materials that he had (tr. p. 833). He said that he had a quantity of pipe and a couple of welding machines and a truck, dies and other tools (tr. p. 834). We referred Dillion to the business agent. We told Dillion that he would have to deal with the business agent and we wanted harmony with him and within the local so we wanted to make sure it was agreeable with the business agent (tr. pp. 834, 835). On the 16th, Mr. Lawson stated that he had no objections to Mr. Dillion having an agreement. He said he was a member of the Local, surely he should know the rules, we shouldn't have any trouble with him. He said, "I believe I can give Dillion a satisfactory agreement" (tr. p. 837). In about April of 1955 I had an occasion to speak with Mr. Randolph, the defendant in this case, at his shop about the meeting of November 29th.

(Exhibit 44 offered in evidence (tr. p. 848).)

(Exhibit 44 admitted in evidence (tr. p. 850).)

All Dillion was talking about with the executive board was pipeline fabrication, that was my understanding (tr. p. 853). On November 22, this matter, everything was satisfactory to the executive board and the agreement should be issued (tr. p. 855).

After the meeting on November 29, nothing was done by the executive board revoking its prior action in the matter (tr. p. 856). [1420] As far as the executive board was concerned, the agreement was still valid and by that time it had been signed (tr. p. 856). The executive board met on November 30 at its regular meeting and did nothing at that meeting to revoke, change or in any way alter or modify the contract Mr. Dillion had with the union (tr. p. 856). After all the hue and cry of the night of November 29, there was not any change in any way, shape or form in the decision of the executive board that I know of (tr. p. 858). I talked to Mr. Vance at the noon recess today and he asked me if I recalled the meeting of November 30 and if Joe had made any threats of suits and I told him yes (tr. p. 863).

(End of testimony of Mr. Lambert (tr. p. 863).)

(Deposition of Mr. William Thorn was published, (tr. p. 870).)

My name is William Thorn. I am a partner in the firm of Thorn and Marble Company. We are mechanical contractors (tr. p. 870). In 1955, I had a contract with Lewis A. Hopkins to do an outfall structure on the Hanford Project (tr. p. 870). I presume we had a written contract, I don't have it with me, I can't remember the terms (tr. p. 871). Our records show the amount that was actually paid to us on this contract. I do not have those records with me (tr. p. 872). We have those records in our office (tr. pp. 872, 873). I do not recall

offhand what the figure was, how much we were paid (tr. p. 873). I think we were paid so much for equipment and so much for materials and so forth (tr. p. 873). The contract of that type is classified as a time and material contract (tr. p. 874). The work that was involved—we did not handle the pipe, it was placed by the general contractor. After the pipe was placed we welded all of the joints up or bolted them except those under the river, which was divers' work and the UA didn't claim it, so we installed the [1421] big pipe up the bank and welded the pieces together that were to be floated down the river, but did not place them in the river. We didn't handle pipe (tr. p. 874). The pipe was 66 inches and I don't remember how many feet long, maybe 600 feet, maybe 1000 (tr. p. 874). I believe the pipe was in 40-foot lengths (tr. p. 875). I think they put three sections together and put them out in the river and sunk them. They had a flange on them and then the diver went down and bolted that section together. Our firm didn't do that. Our firm welded the flange (tr. p. 875). Someone else actually placed them in the river and even placed the pipe on land. We didn't handle any pipe. It was too big for any equipment. There had to be a crane there anyway so the one crane took care of everything (tr. p. 857). I don't recall when we went on the job (tr. p. 876). We weren't on the job very long as far as that goes (tr. p. 876). We welded anchor straps on the pipe so that when they were embedded in concrete there was an anchor flange

there, various things like that (tr. p. 876). I don't remember whether there was a surge chamber on the pipe, I don't remember much about it. There was a structure for the bank of concrete where the pipe ended. I was down on the job prior to that time and I don't remember whether it went in that, and I recall where that surge chamber was placed (tr. pp. 876, 877). I don't recall how many men we used on the job, maybe, I don't know, offhand five to ten. They were journeymen, welders or fitters (tr. p. 877). There might have been a laborer down there or there might have been a truck driver (tr. p. 878). I don't think we had occasion to use riggers. If we had put the pipe in place ourselves I don't think we would have had occasion to use riggers (tr. p. 878). As a rule in our trade the pipe-fitters claim the rigging. That doesn't always hold true. Sometimes a rigger on the job, they [1422] will hook them on the pipe and if there doesn't happen to be a fitter around they will rig it, maybe. As a rule they will rig their own pipe. I know they didn't rig the pipe in the river because that was done by this big barge. We had nothing to do with that (tr. p. 878). We had no heavy equipment operators on our payroll. Our records would show how many men we used on this job and what their trade and occupation was and what we paid them (tr. p. 879). The only name of a man I can recall on the job was Bussell. The reason I remember that one, I think he would be our superintendent. The way they switched the men around I wouldn't know the men they had down there (tr. p. 879). Generally,

we have been working over there for about the last, at least, three years. In that period of time we would pick up quite a few jobs, little ones as well as big ones, and we might have four or five jobs running at once under separate contracts. This one superintendent will move these men around even from day to day or week to week as the jobs progressed to keep the sleeving ahead or getting out of some other trade's way. There was quite a bit of that going on (tr. p. 880). All of our men came from Local 598 (tr. p. 882). I can't recall whether we had to wait for any men or not (tr. p. 882). We make our requisition for men by phone (tr. p. 882). We are signers of the Washington State Agreement (tr. p. 883). We have been engaged in the business that we are now in, which would involve the fabrication and laying of pipes since about 1949 or '50. Prior to that time we had done smaller work, heating plants which was fabricating pipe and small stuff (tr. p. 885). The pipe that we have laid or fabricated or worked with since 1949 or '50 was manufactured in all of the main mills around the country (tr. p. 885). It is not manufactured in the state of Washington unless it is a special order. I think there is a [1423] little pipe that can be rolled at Seattle, but it is never any bulk amount (tr. p. 886).

(End of testimony of Mr. Thorn (tr. p. 887).)

(Testimony of RuDell Beames (tr. p. 88).)

I am RuDell Beames, the business manager of Local 598 of the Plumbers and Pipefitters. I held

that position during the latter half of 1954. I am elected a business manager and to tell the difference between myself and my assistants, we call them business agents (tr. p. 889). The highest number of members that we had in our local during my tenure of office would run between 2500 and 3000, all at one time, active members of the Local. I don't mean they were all working here. We have a lot of them in our Local whose cards are in here that are scattered all over the United States, they haven't worked here for years, but they do have the cards in this Local (tr. pp. 889, 890). I couldn't tell you the exact number that we had working locally during 1954 (tr. p. 890). There were two large contracts on the Hanford Project during 1954, however, they didn't peak at the same time (tr. p. 890). Quite a few of the men that came off the Kaiser job as they were finishing it went right over to the Blaw-Knox job and finished it because it finished after the Kaiser job quite awhile. The Atomic Energy Commission tried to plan it that way because of the shortage of manpower (tr. p. 890). I heard Mr. Arndt's testimony (tr. p. 890). I can't understand what Mr. Arndt was talking about. I don't think he knew what he was talking about (tr. p. 891). This was in regard to manpower, available manpower (tr. p. 891). I was fitting pipe in the oil fields when I was 14 years old and I have been either a helper or a pipefitter ever since (tr. p. 891). Before I was business agent I was general superintendent for Urban, Smythe and Warren right prior [1424] to the time I came to work for the union (tr. p. 891). I have not done any

engineering, planning, bid preparations or preparation of invitations to bid (tr. p. 892). I don't feel that Mr. Arndt knows what he's talking about manpower and availability of manpower. I am not talking about the manpower it takes to put in a job, I am talking about availability of manpower (tr. p. 892). During the year, 1954, I did not assume the duties of entering into contracts, collective bargaining contracts with contractors in this area (tr. p. 892). I might have signed McMillan's contract, I'm not sure. However, it was after it was okayed by the executive board (tr. p. 892). We don't work for general contractors, only those who have a national agreement and I don't recall ever pulling men off of a job (tr. p. 893). Sometimes there has been wildcat strikes over jurisdiction and the men walked off themselves but we always had to put them back. It is against the law to strike over jurisdiction and we have a grievance procedure we have to go through, we must go through it, so it is foolish to pull men off the job. The union has never pulled a man off the job (tr. pp. 893, 894). I would say that I have never ordered men to quit work on a particular contract during the year 1954, that I recall (tr. p. 894). I'll say that I did not personally (tr. p. 894). I did not instruct anybody else to order them not to work (tr. p. 894). There was interruptions, there was quite a lot of interruptions, there always is on any job (tr. p. 894). In the state of Washington, we are represented by a State Board of Negotiators and Arbitrators and I do sit on that body on labor's side, but to tell you how many times we met, how many times

the state board met offhand I can't tell you. We met in Yakima, in Seattle and in Spokane (tr. p. 895). That resulted in the Hanford Addendum in 1952 or 1953. Our experience with Kaiser engineers and Blaw-Knox both was very unsatisfactory. [1425] I sat down with them probably once a week. It wasn't negotiating, it was just interpreting the agreement, deciding who was right (tr. p. 896). I represented the union in interpreting the agreement (tr. p. 896). I don't believe the members of the executive board were ever there (tr. p. 897). After the various negotiations or a weekly meeting, I would report these negotiations to the body of the union (tr. p. 897). Occasionally the union gave me instructions when the problem had not been reconciled before the meeting but generally they were so minor that it had been taken care of and the union accepted my report or rejected it (tr. p. 897). I don't believe the body ever voted on it except that I would make my report to the executive board and they would say the business manager's report accepted, and then the body, of course, has to accept or reject the minutes of the executive board. All power flows from the body in our organization (tr. p. 898). My powers are laid out in the constitution (tr. p. 898). The body exercises control over my activities during the course of my tenure in office (tr. p. 898). I report to the body every two weeks at regular meetings if I am not out of town (tr. p. 898). I don't know how many times I was before the executive board during the year 1954 (tr. pp. 898, 899). They are supposed to meet every two weeks in regular meetings. It is

very probable that they held special executive board meetings (tr. p. 899). The minutes might show how many times I went before the board (tr. p. 900). I was out of town when negotiations were going on for Mr. Dillion's contract. I had asked Mr. Lawson to take care of it. It was probably 75 per cent or better consummated when I returned. Under the agreement, it is the executive board's business to negotiate a new agreement (tr. p. 900). The constitution says that the executive board will be in charge of the affairs of the Local [1426] between meetings (tr. p. 902). I was not engaged with the controversy with the executive board during the time that Mr. Dillion's contract negotiations were going on. We had disagreed previously (tr. p. 904.) I would not say the relationship between myself and the executive board was harmonious (tr. p. 904). I was elected an official in 1954 (tr. p. 904). I was originally appointed (tr. p. 904). The geographical area over which our local claimed jurisdiction during the year 1954 was roughly six counties in Oregon—we generally take care of about half way to Portland on the Oregon side of the river—as far up the Yakima Valley as the Yakima line to highway No. 10 as it goes into Moses Lake, across through the Columbia Basin and across through to Lind. We do have Lind, and Walla Walla County (tr. p. 904). As far as the contractors who have received contracts from our Local are concerned, there isn't any distinction as to what part of the Local's jurisdictional area they may work in (tr. p. 905). During the years 1955 and '56 I personally did not dispatch men to pipeline

and gasline jobs in Oregon. Mr. Lawson handled the pipelines for me (tr. p. 905). I did dispatching of men in 1955 and 1956 (tr. p. 906). Mine is the original responsibility of dispatching all men from the Local, however, I do have two assistants and I delegate certain areas to those people and tell them to run their jobs and dispatch what men they need and if they get in any trouble and need any help, why come to me with their problems, otherwise it is their job (tr. p. 906). If Mr. Lawson got in trouble over signing of a contract with an individual it is his duty to clear it with the executive board, I have nothing to do with the signing of a contract (tr. p. 906). I have worked out on the Hanford Project and I am aware of what general contractors had UA contracts or United Association contracts with the pipefitters [1427] in 1954 and were working on the Hanford Project (tr. p. 907). Mr. Lewis Hopkins did not have a contract with our local (tr. p. 907). Mr. Hopkins was not entitled to obtain men from our union under a contract (tr. p. 908). Those contractors who had agreements with ourselves or with some other UA Local might be in California or Kalamazoo, were entitled to obtain men from our local (tr. p. 908). If Kaiser engineers and Blaw-Knox had international agreements or Joe Head had a local agreement he was entitled to receive men (tr. p. 908). If a general contractor did not have an agreement with our local and he started putting in pipe we would be very unhappy about it (tr. p. 908). I am generally acquainted with the items of work over which my Local and Interna-

tional claim jurisdiction. We claim jurisdiction over certain portions of laying of pipe, steel pipe. We don't put it in the ditch. We don't string it along the ditch, but we do claim jurisdiction over welding it together or dresser couplings or whatever method is used in connecting it together (tr. pp. 911, 912). We have pipefitter riggers. Their duty is to do the rigging on any equipment that comes under our jurisdiction. Our union would object if a general contractor started handling pipe without a contract with our union (tr. p. 913). In fact, that is what jurisdictional strikes are made of, somebody else handling what we claim to be ours (tr. p. 913). It is happening every day on the Hanford Project, not only between our crafts but every craft (tr. p. 913). There was no jurisdictional trouble that I recall during the course of Thorn and Marble's job involving our people, where our people walked off the job (tr. p. 913). I'm sure I dispatched two men to Mr. Dillion's job at one time (tr. p. 914). It was my conclusion that Mr. Dillion had a contract with our Local (tr. p. 915). [1428]

Prior to the 15th of November, I was not aware of any efforts on the part of Mr. Dillion to set up a fabrication shop (tr. p. 917). In my deposition I said I don't know, in answer to the question whether discussions concerning this pipe fabrication shop and pipe fabricating deal were under way during the months of October and November, 1954 (tr. p. 918). There were others in the Tri-City area interested in setting up a pipe fabricating shop and I

did discuss with them (tr. p. 919). I don't remember the dates. I understood that attorney Molthan was the attorney for a group of Kennewick people who were thinking of setting up a fabricating shop, but that particular deal never got far enough along for them to ever talk to me about an agreement or anything; however, I did hear about it (tr. p. 920). I don't know what interest Attorney Molthan had, if he had any (tr. p. 920). I didn't know whether or not Mr. Mokler, Mr. Head and Mr. Randolph were members of the joint conference board in 1954 (tr. pp. 920, 921). It was not my responsibility to work with the joint conference board. It is my responsibility to deal with the employers but not on the joint conference board. Our records would not show whether Mr. Mokler, Mr. Head and Mr. Randolph actually were members of the joint conference board (tr. p. 921). Mr. Randolph did not contact me as a member of the joint conference board at any time during the month of November, 1954, and ask me for a meeting of this board (tr. p. 921). Exhibit 50 probably came into my office but I wasn't there and the girls probably filed it. I never saw it (tr. p. 921). I wasn't even aware that the joint board was meeting as such (tr. p. 922). The only conversation I think I had with any of the masters was probably over the phone with Mr. Head. I told him if he wasn't satisfied with Mr. Dillion's contract to take it before the Local conference board. I don't know what date that was (tr. p. 922). [1429] When I said in my deposition that the Local conference board was not operating and that we had no

problems, I meant that they weren't active. We hadn't had a meeting of the Local conference board for—well, I can only remember one meeting that we had in probably two years (tr. p. 924). The master plumbers have a right to change their membership in the Local conference board any time they want and don't necessarily notify us (tr. p. 924). I stated in my deposition that I didn't believe there was a meeting of the Local conference board as such on November 29. I didn't believe there was. I thought they met with the executive board. However, I have found out since that there was a meeting of the Local conference board, but I wasn't there, and there was nothing in any of the minutes that I received of the executive board minutes to indicate that they had met with them and I didn't know what took place (tr. p. 925). Throughout 1954 the Local paid \$250 a month rent to Mr. Head (tr. p. 926). We have been looking for another location but have not found one yet (tr. p. 926). As I just said, I told Head that if he had any objections to Mr. Dillion's contract he could call the Local conference board meeting (tr. p. 926). I said in my deposition that I discussed it with Mr. Dillion and I assured him at that time that it was a problem of his and the executive board concerning a contract, and under our working rules the executive board must approve all agreements. I told Mr. Dillion he should see the executive board (tr. p. 927). But I told Joe Head that if he wasn't satisfied he would have to see the Local conference board (tr. p. 927).

I couldn't tell you the date when I had these conversations with Mr. Head about Dillion's contract (tr. p. 928). In my deposition in answer to the question as to whether I had had any conversation with Mr. Head between the dates of November 15, 1954, and November 22, 1954, [1430] concerning the Dillion contract, I said that I believed he said that as far as the Washington State Agreement was concerned that Dillion, if he had an agreement, wasn't living up to the rules of the Washington State Agreement, which sets up certain standards that must be met by any contractor before they go into business (tr. p. 929). That's what I said in the deposition. That's right, but we didn't discuss what was in Dillion's contract (tr. p. 929). This does not refresh my memory as to whether it was before the 22nd of November. I don't remember when it was (tr. p. 929). I talked to Mr. Mokler, it was either in front of his shop or in his shop. I think he brought it up about the meeting that was held, the local conference board meeting and he stated at that time that it was none of the master's business who we signed a contract with. He said the meeting was a phony or something like that. He meant unnecessary. He gave me that impression, that he didn't consider it any of the boss' business who we sign a contract with (tr. pp. 929, 930). This was after they had held the meeting and I believe within just a few days after the meeting. After Thorn and Marble took over the Hopkins contract, I believe Central Plumbing and Heating Co. finished the job in the area, maybe a week after that, and we had a few men and we dis-

patched some of them to Thorn and Marble (tr. p. 931). I do not know what day the Hopkins contract was cancelled on Mr. Dillion (tr. p. 931). I don't know when we first dispatched men to Thorn and Marble (tr. pp. 931, 932). It is possible our records reflect this (tr. p. 932). I don't believe it is a fact that one of the men was on the Blaw-Knox job three days and was pulled off and put immediately on the Thorn and Marble contract. I never pulled a man off a job. If he wants to quit he can quit. We will do the best we can to put him to work (tr. p. 932). I know Matt Torgeson, a welder (tr. p. 932). [1431] I do not know Paul W. Wood, a welder. I don't know whether Paul W. Wood came off a contract other than this contract and went to work on the 7th, three days after the Dillion contract. The Thorn and Marble job that was taken over from Mr. Dillion was not necessarily to be done entirely with welders. Welders could do the whole job but they could use other than welders on it (tr. p. 943). Steamfitters were in fact used (tr. p. 944). There might have been a plumber, too, sent out there (tr. p. 944). There might have been a few plumbers and steamfitters and riggers unemployed during the time that Mr. Dillion was seeking men for his job, but there was none seeking work, otherwise he would have gotten them (tr. p. 944).

(Further testimony concerning availability of men omitted as not material to the appeal). Plaintiff's Exhibits 61, 62, and 63 are the record of dispatches of men from Local 598 during the periods

indicated on the face of these exhibits (tr. p. 971). Exhibits 65 through 73 are work history cards of members of the Local (tr. p. 972). There was no plumbing on the Thorn and Marble job that I know of (tr. p. 994). The only discussion I had with Bilderback was that he told me Dillion had been to see him at the hotel or something (tr. p. 997). I don't remember discussing the matter with Mr. Thurston during the latter part of November or the month of December, 1954. It might have been mentioned in one of our telephone conversations (tr. p. 997). I told Lawson that Mr. Dillion needed men and asked him if he had any on the hook any place down around Oregon or Walla Walla which we could pull in (tr. p. 997). I first became business agent of Local 598 in the latter part of July, 1952, by appointment (tr. 1003). Prior to that time I was general superintendent for Urban, Smythe and Warren (tr. p. 1003). Prior to being appointed business agent I had been on the [1432] executive board and examining board and I was vice president (tr. p. 1003). Those jobs were not salaried jobs. In the fall of '52 I ran for office and was elected (tr. 1004). I ran in '55 and was elected. My job as business agent is a salaried job (tr. p. 1005). I have been on the State Board of Negotiators and Arbitrators since 1953. That is the board that negotiates the statewide Washington State Agreement (tr. p. 1005). There are six representatives of labor and six representatives of management (tr. p. 1006). Blaw-Knox has an unlimited national agreement (tr. p. 1006). A national agreement holder that has an un-

limited agreement can do any type of work, but when he comes into a territory he has to pay the same wage scales and operate under the same conditions as far as fringe benefits, travel time is concerned as any local contractor. However, they are under the direct supervision of the International. The International is the business agent for the national contractors. If there is any grievance that amounts to anything we immediately get the organizer in because they do have a form of agreement and they are responsible to the international and not the local union (tr. p. 1006). An employer with a national contract having a grievance would not go through the State Board of Arbitrators and Negotiators. That would be taken up with the International union and the employer (tr. p. 1007). Clayton Bilderback represents the International union when necessary on such matters as that (tr. p. 1007). Kaiser had an unlimited national agreement. Those doing mechanical contract work on the Hanford Project in 1954—I probably can't remember all of them, were Hovenwell, Johnson-Kroll Company, Blaw-Knox, Kaiser Company, Thorn and Marble, Avery Company, Bumstad and Woolford, I believe University had a tank farm, a contract to install underground tanks, J. P. Head, Central Plumbing and Heating. Offhand, I can't remember [1433] any more, there might have been more (tr. p. 1008). Mr. Mokler or Mr. Randolph I don't believe did business on the Project (tr. p. 1008). Mr. Dillion requested welders from me (tr. p. 1009). There would be no work for fitters unless there was welders. Any

fitters that would be on the job after that would just there to assist the welders (tr. p. 1010). On processed piping the type that is in the area, I would say 90 per cent of the work is welding. There is a few screwed pipelines but 90 per cent of it is welded. The fitters do work along with the welders, brush welds, carry their leads around for them, help put the pipe in position to weld together, but if they don't have welders there just isn't any job. They can't use the fitters without the welders (tr. pp. 1010, 1011).

(Another omission of cross-examination regarding the availability of men omitted as not relevant to the appeal.)

The primary purpose of the so-called history card is a financial record to keep track of the payment of the members' dues (tr. pp. 1022, 1023). If a man comes into the office and says that he is out of a job and wants a job his history card is put in the out-of-work file (tr. p. 1023). They are classified by trade into plumbers, fitters and welders (tr. p. 1023). The metal tradesmen who work for General Electric are in a separate file (tr. p. 1023). Those men whose cards are in the out-of-work file are not always available for work (tr. p. 1024). We have around 300 men in the Local now that are scattered all over the United States, just pay dues in there. Our dues was only \$3.50 a month at that time and they just leave their cards in our Local, work all over the country. We have almost 300 of them scattered around throughout the United States and the

Orient, Alaska and Canada now. I don't know where they are, they send their dues in wherever they are working [1434] but they are classed in the out-of-work file (tr. p. 1024, 1025). If we have requests for men from various contractors and are unable to fill them we try to pro-rate them (tr. p. 1025). Out in the area many times the Atomic Energy Commission has requested me to give some additional men to a certain contract that is falling behind, do everything I can to help that particular party out because they are going to need that contract a little sooner than they anticipated, or they think that it isn't up to schedule or something like that (tr. p. 1026). During this time in question, November, 1954, I would have such conversations with Mr. Henry Thurston at the Atomic Energy Commission. Sometimes I talked to him two or three times a week and then other times I don't hear from him for a couple of weeks (tr. p. 1026). I don't have one contractor that doesn't complain. Every one of them thinks everybody else is getting better treatment than they are, being sent the best mechanics, get men sooner than they do. If I could ever satisfy one of them just one week I would make a mark on the wall (tr. p. 1028). This so-called "yakking" of Mr. Head did not have any effect upon my dispatching of men (tr. p. 1028). Normally Mr. Head would take any conflict between us and the masters with regard to Mr. Dillion's contract before the local conference board. If he wasn't satisfied with their decision within, I think it is 48 hours, he has a right to appeal it to the State Board

of Negotiators and Arbitrators (tr. p. 1029). He evidently took it up with the local conference board. There was no minutes and I wasn't there (tr. p. 1029). I have never taken any of the contractors before the local conference board (tr. p. 1030). There was no argument between Dillion and myself (tr. p. 1030). The conference board has a right to fine either party and the fine goes into a charity fund. It could go as high as \$250. Mr. Head did not discuss with me the matter of [1435] a fine that might be levied against me as a result of the Dillion case (tr. p. 1031). Mr. Dillion was a member of our local (tr. pp. 1032, 1033). Mr. Thurston was never a member of our local (tr. p. 1033). Our local does not have a direct working relationship for the Atomic Energy Commission, but the Atomic Energy Commission establishes precedent out there for almost all labor relations working conditions and we are constantly in touch with them (tr. p. 1033). We had a contract with the Washington State Association—of the employers in the pipefitting industry, a labor management agreement, and Mr. Dillion had a contract under that general agreement (tr. p. 1033). There has been occasions when I give special consideration of emergency work and Atomic Energy work. If the Atomic Energy Commission has two cost-plus-fixed-fee jobs going out there, they are responsible for the payroll and if one contractor had a call in for seven welders and they had a quick change-over job, maybe, for instance, like Urban would have on maintenance and repair, something that would have to be done, and they would ask me

to shove Urban a few extra men, why I would certainly take it into consideration. They are supposed to know which one, which job, is the most critical and it is the taxpayer's money (tr. pp. 1033, 1034). During the last half of November, we were furnishing men from our local to many contractors other than Blaw-Knox and Kaiser (tr. p. 1035). We were not to my knowledge giving special consideration to any of those contractors other than Blaw-Knox and Kaiser (tr. p. 1035). We do not have any way of establishing in writing from our records what employers called for how many men on what day (tr. pp. 1039, 1040). Kaiser Engineers Division put requisitions in writing (tr. p. 1040). Most of Mr. Randolph's and Mr. Mokler's work is just conventional plumbing and heating, what we call uptown work. I can't remember of either one of them ever having [1436] any pipeline. They do their own fabricating for heating plants. Every job has a certain amount of fabricating (tr. p. 1047). If they had a schoolhouse with a couple of boilers in it they would have to have the steam head running across the top and 90 per cent of the time it would be probably ten-twelve inches and be welded. That would certainly be pipe fabrication as far as I am concerned (tr. p. 1048). I don't think either Mr. Mokler or Mr. Randolph ever called for a rigger. They use a welder once in awhile (tr. p. 1048). I would say 90 per cent of the work on the project is done by contractors from outside the Tri-City area (tr. p. 1049). I don't know who the largest contractors in the Tri-City area are. I believe Mokler has got about

one or two men working for him, I don't know who has got the most money (tr. p. 1049).

(W. C. Dillion recalled.)

I worked for Mr. Mokler in August of 1954 for approximately four or five weeks (tr. p. 1065).

(Testimony of Jack Cooney (tr. p. 1111).)

My name is Jack Cooney. I am a school instructor. I am director of the Columbia Basin College at Pasco. There is a welding school in that college (tr. p. 1111). I have worked for the Pasco School District since 1946. Prior to that I was with the Richland School District. In the fall of 1954, the college had a lease on building 118. I had a contract with Mr. Dillion (tr. p. 1112). We were moving out of building 118. We planned to move about the first of December and move into a large hangar building and establish our welding classes there. He said he was going to take over the building. We had 13 welding machines in the building at that time. I couldn't make any arrangements to lease or rent any of those machines to Mr. Dillion for the simple reason the machines belonged to the school district. I had [1437] no authority to do so. I made no such deal (tr. p. 1113). Mr. Cotton is manager of the Pasco Airport. I don't know who tagged the machine with Mr. Dillion's name in the fall of 1954, about the 15th of November, 1954 (tr. p. 1114). I had a discussion with Mr. Dillion regarding our possession and his possession about the middle of November (tr. p. 1114). He wanted to know, he said

inasmuch as he was going to take over the building he wanted to know what we were going to leave in the way of electrical gear and so forth and I said that we would take the gear that we had placed in that building. That building was formerly a blacksmith shop and had a small, oh I think it was about 400 amp switch built into it (tr. p. 1220). This conversation took place in my office at the air base. I never was in the shop with Mr. Dillion over there. I don't believe I discussed with Mr. Dillion the number of machines that were there. I might have discussed with Mr. Dillion the condition of the machines inasmuch as we needed approximately ten more machines when we moved into the other shop at that time (tr. p. 1115). We were using all of the machines in that shop. I believe they were all in working order unless they were temporarily down for repairs (tr. p. 1116). I never saw one of these machines tagged with Mr. Dillion's name. The amount of time that I have been in the school field, I know that I could not rent a welding machine without authority of the Superintendent of Schools or the School Board (tr. p. 1116). I am acquainted with Mr. Beames (tr. p. 1116, 1117). I would say I've known him since 1948. Mr. Beames and I have worked with both management and labor in determining the training necessities of the area. We have committees of management and labor, advisory committees of management and labor to advise us in the methods and type of training that is needed. I only act as consultant to these committees. Mr. Beames is not on any of these [1438] committees. I do not recall that Mr. Beames has ever been on an appren-

ticeship committee. I could be mistaken. I believe I was contacted by counsel for defense about this possibly six months or a year ago (tr. p. 1117).

(Testimony of Bill J. Meler.)

My name is Bill J. Meler. I am steamfitter welder and a member of Local Union 598 and have been off and on for seven years. In the fall of 1954 I was dispatched to the job that is being run by Mr. Dillion (tr. p. 1118). I stayed there a day and a half. I quit because I wanted to go onto a better job in Oregon for W. R. O'Rourke Plumbing and Heating in Walla Walla. I had the O'Rourke job in mind about two and a half months. I had worked for him on a schoolhouse job and I was promised this job in Oregon at the Umatilla Ordnance Depot just as soon as it started (tr. p. 1119). When I quit Mr. Dillion I did not immediately go on the O'Rourke job (tr. p. 1119). The job wasn't taking men at that time. It was my understanding that they were. I found out they weren't during the week right after I quit Dillion. After I quit Dillion I went to Thorn and Marble and worked for them approximately six weeks on the job Mr. Dillion had. I didn't finish that job, I quit and was dispatched to O'Rourke at the job I wanted at Umatilla, Oregon (tr. p. 1120). I have seen Mr. Dillion since at Anacortes, Washington (tr. 1120). That was at the Shell Oil Refinery. I was assigned to the fabrication job and I was walking down the center aisle of the shop and Dillion was coming the other direction. We met in the center of the aisle and I stuck out my hand

and he said no, I won't shake hands with you. I had no other conversation with Mr. Dillion in Anacortes (tr. p. 1121). I now work at the chemical plant in Kennewick. W. W. Cape dispatched me to this job (tr. p. 1121). He is assistant business [1439] agent of Local 598 (tr. p. 1122). I don't work at all in the Tri-City area unless someone from that business office dispatches me (tr. p. 1122). When I quit Dillion's employment I felt assured that I had the job but I didn't know positively (tr. p. 1122). I am a married man with two children and was married in 1954 and had two children at that time (tr. p. 1122). I am not positive about the date I talked to Dillion in Anacortes. It was about May of 1955. No, I don't recall saying to Dillion, "Tater, I've been wanting to talk to you. I wanted to see you make it as much as anyone else but the Local pulled me off. It wasn't me, it was the Local." The only thing that he said, "No, I won't shake your hand," he said, "if you had gone off on another job instead of going to Thorn and Marble," he said, "I would have felt different." That was the sum total of the conversation.

(End of testimony of Meler.)

(Additional testimony of plaintiff Dillion.)

I heard Mr. Meler testify about an encounter between him and me in Anacortes. It was spring of '55 (tr. p. 1135). I met Mr. Meler almost in the middle of the shop when he first come in there and he wanted to shake hands with me and I told Mr. Meler that I didn't feel like that he was a friend of

mine, and there wasn't no use of me shaking his hand and he said, "Tater, I have been wanting to talk to you about this for a long time." He said, "it wasn't me," he said, "I wanted to see you make it, but," he said, "the union pulled me off of that job." Then I said, "Well, Mr. Meler," I says, "You could have made as much money with me as you could have with Thorn and Marble." And Mr. Meler said, "No," he said, "I done all right," he said, "I done good out of it."

[Endorsed]: Filed September 24, 1957. [1440]

United States District Court, Eastern District of
Washington, Southern Division
Civil No. 978

W. C. DILLION,

Plaintiff,

vs.

PLUMBERS & STEAMFITTERS UNION,
LOCAL No. 598 of Pasco, Washington; W. W.
CAPE; RUDELL BEAMES; WILLIAM
LAWSON; J. P. HEAD, d/b/a J. P. HEAD
PLUMBING; J. L. MOKLER and JAMES
MOKLER, d/b/a MOKLER PLUMBING &
HEATING; R. E. RANDOLPH and E. L.
TAYLOR, d/b/a RANDOLPH & TAYLOR
PLUMBING & HEATING,

Defendants.

RECORD OF PROCEEDINGS
AT THE TRIAL

* * *

The Court: All right. Two alternates.

Mr. Vance: One other matter, your Honor. The defendants that I represent, we have several affirmative defenses there, and I want to withdraw the fourth affirmative defense.

The Court: Oh, let's see——

Mr. Vance: The answer.

The Court: You have an amended complaint, haven't you, here?

Mr. Vance: Yes.

The Court: Molthan is not in the case any more?

Mr. Vance: No. Entitled the answer of Plumbers Local 598, is the document that I refer to. That is the one on fraud. It is drawn on Molthan's paper.

The Court: Oh, yes. Answer of Union, you say? Answer of Plumbers and Steamfitters Union?

Mr. Vance: Yes, that is it. Beginning at page 4, line 20, fourth affirmative defense.

The Court: Is that the one—let's see—on which page did you say?

Mr. Vance: Page four, toward the bottom of the page, line 20. [51]

The Court: Oh, I see, yes. That is the fourth defense?

Mr. Vance: Yes, your Honor. [52]

* * *

Plaintiff's Opening Statement

Mr. Gladstone: May it please the Court, ladies and gentlemen of the jury: At this point, you have

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

been sworn to hear the facts in the case and, upon hearing the facts, determine the outcome of the litigation.

I would like to identify for you the parties involved. This is the plaintiff W. C. Dillion, and several of the defendants. The defendant Union, represented by Mr. Beames, is in the grey suit sitting on the far side. The defendant J. P. Head, who is the owner and operator of a plumbing shop in Pasco, sits next to him. Mr. Mokler, who operates the firm of Mokler and Mokler Plumbing in Kennewick, sits next to him; and Mr. Randolph, of the plumbing firm of Randolph and Taylor, sits next to him.

Now, this action is one brought by Mr. Dillion against first the Union for a breach of contract. Mr. Dillion alleges that he entered into an agreement with the Union whereby they agreed to furnish him men, and they set forth the terms of employment and working conditions, which is called a collective bargaining agreement; that Mr. Dillion entered into the business of pipe fabricating and pipe [53] laying; that he asked for men in order to do the work, to do a contract that he had. He was furnished two men and they refused to furnish him any more. That this, then, constituted a breach of the agreement with them and that he was compelled to go out of business, lost his contract, and suffered damages thereby.

Now, we also allege a second cause of action, that is, a conspiracy, alleging that they breached their agreement, the Union breached its agreement with Mr. Dillion, in pursuance of a conspiracy; that the

Union entered into a conspiracy with the three operators of the plumbing shops that have been identified over here—Mr. Head, Mr. Randolph, and Mr. Mokler. They entered into a conspiracy to get Mr. Dillion from getting men, the purpose of the conspiracy being to keep him from becoming a competitor of theirs in the pipeline, pipe fabricating, business, that being also a business that they engaged in during this period of time.

Now, the actual time involved, the crucial time covered, was only a couple of weeks, but it started back in 1952 and really covers quite a long period of time in terms of what Mr. Dillion was doing, and we have here a calendar of events setting out what it is our intention to prove.

Now, I might say here that on the conspiracy action, and that is the action that we are putting [54] the greater emphasis on, as the Court mentioned in its opening remarks to you, a conspiracy action, of its very nature, is a secret type——

Mr. Burdell: Object to counsel's remarks in his opening statement.

The Court: Yes, the purpose of an opening statement is merely to tell the jury what you propose to prove. I think you should try to keep away from argument.

Mr. Gladstone: I would say on this point merely that the conspiracy action will involve evidence that is not direct; that conspiracy is that type of action where you don't find any direct testimony on what people are doing——

Mr. Burdell: Object to that.

Mr. Gladstone: —but must be established circumstantially.

The Court: Well, I think I should say to the jury at the outset that they should bear in mind—and this applies to opening statements both of this plaintiff and defendants' opening statement when they make it—that it isn't evidence at all, it is just simply for your convenience to enable you to better follow the evidence that will be put on, and counsel's opening statement is simply to give you an idea of what he proposes to prove by his witnesses and by his evidence, and you must bear in mind always, of course, that it is the evidence itself that you are to go by and not [55] by counsel's statement if it isn't supported by the evidence.

I think counsel is pointing out that his evidence will be largely circumstantial. Now, that is what he is trying to tell you, I think.

Go ahead.

Mr. Gladstone: On the evidence itself, what we will attempt to show you here and what we intend to prove to you is that Mr. Dillion has spent his life learning the pipe laying, the pipe fitting, the pipe fabricating, business; that he has been associated with this trade for many, many years.

In 1952, he made the decision to go into fabricating in the Tri-City area. In March of 1953, he knew that he was going to have investment problems, as anybody does when they go into business; that he was going to have to obtain capital, so he started to build a home, that is, in his off hours he was build-

ing a home, so that when he wanted to get his money, he would have that as an asset that he could put a loan on to obtain money for his business. So that was in March of '53 when he was working at a trade he was building, as best he could, a start of his home.

Now, then, in December of 1953 he started acquiring, he was gathering together his equipment so that he could open [56] a shop.

In the summer of 1954, he had discussions with the Union men regarding the setting up of a shop. At that time he discussed with them what his plans were. Even at that time he talked with one of them in terms of "Would you be interested in going into such a venture with me?" Discussed that.

November 1st of 1954, he began to actually firm up his plans and he got a lease on a shop out at the Pasco Airport.

November 9th of 1954, one of his early meetings with the Union people or, that is, the Union Executive Board, the Board which you union men will know. That is a board that is elected to look after the affairs of the local union. It is a group of men that act somewhat as a board of directors. Met with them and discussed his plans and asked what he would have to do, and they informed him what he would have to do in order to get a collective bargaining agreement. They mentioned that one of the things that he would have to acquire or obtain and furnish was a bond, and this would be enlarged upon in the course of the evidence.

Then he obtained on November 10th an agreement

from the Union's attorney. Actually, it was a rough draft of an agreement furnished by the attorney's secretary. [57]

On November 15th, he obtained a letter from the Union's attorney, Mr. Molthan, regarding his bond, and on the evening of this date he met with the Union Executive Board. He indicated his desire to meet with them and they called a special meeting to talk to him about getting a collective bargaining agreement.

On that evening, they inspected his shop. He had set up his shop out at the Pasco Airport at that time. Most of his equipment and tools, and so forth, were still at his home. He hadn't moved that out to the shop because of the work that he contemplated doing if he got the collective bargaining agreement. Nevertheless, he had this location, and the Union Executive Board went out and looked it over.

Then on November 16th, he had another meeting with the Executive Board. That was their regular meeting night. He stopped in and talked with them and they were concerned at that time with whether or not Mr. Dillion had a contract for work, that is, a contract, where he could go into pipe fabricating and pipe laying, and they called Mr. Hopkins and determined that at that time he didn't, but Mr. Dillion informed them that there were these negotiations pending with Mr. Hopkins.

Then Mr. Lawson was brought in. Mr. Lawson was an assistant business agent for the union over there at that time. Mr. Lawson was brought in and the Executive Board [58] inquired of him as to Mr.

Dillion's qualifications. At that time it was determined that Mr. Dillion was entitled to a collective bargaining agreement.

An agreement was then obtained the next day from attorney Molthan, that is, the Union's attorney, and Mr. Dillion produced the bond that the Union desired, which is one of the qualifications.

Then Mr. Dillion saw Mr. Beames on the 18th. Mr. Beames was the business manager, and again you men who are union people know that there is a manager of the union and that is what Mr. Beames was, the business agent, and Dillion saw him regarding the signing of the agreement. The agreement had been written up but it hadn't been signed, and Rudy, Mr. Beames' first name, said that he would see him the next morning.

On the 19th, Mr. Dillion saw him again and did get a rundown. He was informed that there would be a certain investigation further by Mr. Beames as to whether or not he was entitled to it and discussions of that type.

Then on November 20th and 21st—this would be on Saturday and Sunday—Mr. Dillion met again with the individual members of the Executive Board, told them of the problems that he was having in getting the collective bargaining agreement signed, and they assured him that so far as they were concerned it was satisfactory and he should have [59] an agreement.

Then on the 22nd, another special meeting of the Executive Board was called at the request of Mr. Dillion to firm up this fact that he was entitled to a

collective bargaining agreement, and would be entitled to get that from the Union.

November 23rd, the agreement was finally signed by Mr. Lawson, or rather it was on the evening of the 22nd, and Mr. Dillion picked it up on the 23rd, but on November 26th Mr. Dillion asked for men, after he made known here in between the 25th and 26th, he made known to the Executive Board, or rather to Rudy Beames, the business manager, of the fact that he now had the collective bargaining agreement and he would be asking for men.

He did at this time firm up his work contract with a Mr. Lewis Hopkins. He firmed up an agreement with Mr. Lewis Hopkins whereby he would do a pipe laying job out in the Hanford Works near Richland. He firmed that up and he told Mr. Beames that he would be asking for men and Mr. Beames would not furnish him any men at that time.

Now, Mr. Head and Mr. Beames were together at this time. Also, on the 24th when Mr. Dillion contacted Mr. Hopkins, the man whom he had the work contract with, Mr. Hopkins and his superintendent informed him that Mr. Head had called up and said that he was going to see to it [60] that Dillion got no men. Mr. Head had also bid on this job out in the Hanford area attempting to get the contract from Mr. Hopkins, and he was still in contact with Mr. Hopkins.

On the 27th, Mr. Dillion asked for men, they were denied, and finally on the 29th two men were dispatched to him, one was a welder and one was an-

other worker. A welder went out to work for him. This man worked one day, then went up and told Mr. Dillion that "I have work elsewhere and I am going to leave the job."

Mr. Dillion tried on further attempts to get men from the Union, which were not fruitful at all. He got no men after that.

So that on the 30th of November, there was a meeting of what is termed a Joint Conference Board. The Joint Conference Board is a board comprised of three men belonging to the Masters, that is, the Master Plumbers are men that own shops and employ plumbers and employ pipe layers and the like of that.

Now, Mr. Randolph, Mr. Mokler, and Mr. Head were the members representing the Masters at that time that met with three members of labor, and at that time they also had the Executive Board meet with them, and we intend to show that that meeting was called at the urging of Mr. Head and that it was his purpose, by his own statements, to be a meeting to arrange for the cutting off of men for Mr. Dillion. [61]

Now, as I say, the actual tie-in of the action taken by Mr. Head and Mr. Randolph must necessarily be circumstantial. We can't pin down actually where they met, where they talked about it, but we feel we can furnish evidence to you which shows that they were participating in Mr. Head's endeavors to keep Mr. Dillion from getting men.

The Executive Board met again after the meet-

ing of the Joint Conference Board on this same evening. The Joint Conference Board adjourned, the Executive Board met. They confirmed again that so far as they were concerned Mr. Dillion was entitled to men.

Mr. Dillion went to Mr. Beames the next day to get men and Mr. Beames said, "Absolutely no, no men."

Now, if I have succeeded in making it plain to you, at this point probably one question has arisen in your mind and that is as to the liability of the Union if the Executive Board was going along with this proposition of giving Mr. Dillion men. We feel we will establish this for you also, that during this period of time, starting in the early part of 1954, that Mr. Beames was setting himself up actually and factually as the real representative of the Union, of that local Union; that he was sidestepping and pushing aside the Executive Board all the way along during that period of time; that it was his actions that constituted the actions of the Union really, and the Executive Board was [62] performing its function and they were saying to Mr. Dillion, "You are entitled to your men." It was Mr. Beames, the business manager, who had taken over and obtained control of that union so that he could by his actions and by his activities with these other men deprive Mr. Dillion of the men that he was seeking, keep him from carrying on with his contract, keep him from staying in business, so that he lost his investment, he lost the profit that he

would have made on that contract and the other contracts that could have been and would have been obtained there in the area. But that is the reason we say they are responsible and liable to Mr. Dillion in damages for what he has been out, because of those wrongful acts.

Now, we will attempt to maintain for you throughout the trial the calendar of events here so that you can follow this. There will be many witnesses testifying to events on certain dates and we will attempt to maintain this so that you can keep from getting into a morass of confusion, as I am sure you would without this reminder for you.

We will certainly appreciate your attention during the trial to our witnesses and feel that we can present the case as I have outlined it here.

Thank you.

The Court: Did you wish to make your statement now or reserve it? [63]

Mr. Burdell: I would like to make one now on behalf of my clients.

The Court: All right.

Mr. Vance: If your Honor please, the Union clients desire to reserve their statement.

The Court: All right.

Mr. Day: Your Honor, might I interject a question? Is it intended that counsel will divide their statements, make two separate statements?

The Court: Well, they are representing different clients. I think they have a right for each to make a statement for his particular client. I see no reason

why one can't make it now and the other reserve it if he wishes.

Go ahead. [64]

* * *

DEFENSE MOTIONS

Mr. Vance: * * * Come now the defendants Plumbers and Steamfitters Union, Local 598, W. W. Cape, Rudell Beames, and William Lawson, and move the Court to dismiss the case by reason of [1209] the insufficiency of the evidence to go to the jury. This motion is made——

The Court: Your motion is for directed verdict?

Mr. Vance: Yes, your Honor, or for dismissal.

The Court: I have been a long time on the bench, about ten years now, I still am not clear on whether or not a motion to dismiss is proper in a jury case at the close of the plaintiff's evidence. I know it is done both ways and I think in a case not long ago I granted a motion to dismiss, but I feel a little uncomfortable about it, because I wonder if it shouldn't be a directed verdict where there is a jury and a jury has been empaneled and has heard the plaintiff's evidence.

Mr. Vance: Well, I will make it jointly, a motion——

The Court: Make both of them.

Mr. Vance: ——for dismissal and a motion for directed verdict jointly and severally on the grounds of each and of those four defendants.

The Court: I don't know whether there would be any difference, I don't know whether it would be

with prejudice in a case of dismissal or not. A directed verdict, it would be with prejudice.

Mr. Vance: Yes, it would be.

The Court: A final determination.

Mr. Vance: I had quite an argument about that not so [1210] long ago in the state court.

The Court: All right, Mr. Burdell, have you any opinion to express about this matter, motion for directed verdict?

Mr. Vance: I just want to say I was going to put it in any form that I want my people out.

Excuse me, Mr. Burdell. If the Court please, that, of course, goes to both causes of action as far as the defendant Union is concerned.

The Court: You should move separately as to each cause of action because that is just the same as two lawsuits put under one cover for convenience.

Mr. Vance: That is correct. Well, maybe I'd better restate it.

Comes now the defendant Plumbers and Steamfitters Union, Local 598, and moves for a directed verdict or a dismissal of the action on the first cause of action alleged in plaintiff's complaint by reason of the insufficiency of the evidence against it and now adduced at the close of the plaintiff's case, and come now the four defendants, Plumbers and Steamfitters Union, Local 598, W. W. Cape, Rudell Beames, and William Lawson, and move for a directed verdict or a motion to dismiss the second cause of action alleged in plaintiff's complaint by reason of the insufficiency of the evidence against

either or all of them, this latter motion [1211] being made severally and jointly.

The Court: Your people are only in the second cause of action, I think, Mr. Burdell.

Mr. Burdell: That's right.

The Court: I think you were in Yakima, weren't you, when Mr. Gladstone made the statement when Mr. Molthan was arguing there—I just ran across it in the file here—he made the statement the first cause of action was directed to the Union only?

Mr. Burdell: Well, I think I was there. I always understood——

The Court: I assume that is the position of the plaintiff, isn't it?

Mr. Gladstone: Yes, your Honor.

The Court: I should think it would be, because the contract is only with the Union.

Mr. Burdell: Yes. On behalf of J. P. Head, J. L. Mokler, R. E. Randolph, and E. L. Taylor, and on behalf of each of them separately, I move that the court direct a verdict in favor of all and each of said defendants, and I also move that the Court dismiss this action as to all and each of said defendants on the following grounds:

That there is not sufficient evidence to submit to the jury or to sustain any verdict of a jury with respect to the issue of conspiracy under the Anti-Trust laws as to any [1212] or all of these defendants; on the second ground that there is not sufficient evidence to submit to the jury or to support a verdict of the jury with respect to the element which must be proved by the plaintiff, that

the conspiracy, if one did exist, was a conspiracy in restraint of interstate trade or commerce as that term is interpreted under the Sherman Act; third, on the grounds that there is not sufficient evidence to submit to the jury or to support a verdict of a jury as to all or any of these defendants on the issue of whether or not the conspiracy, if one did exist, was a conspiracy to injure the public or an unreasonable conspiracy in restraint of trade as that term is interpreted under the Anti-Trust laws; in other words, that there is no showing that the conspiracy, if one did exist, was one of the nature which would violate the Anti-Trust laws, even assuming some effect or restraint upon interstate commerce; fourth, that there is not sufficient evidence to submit to the jury or to sustain a verdict that the injury of the plaintiff, if any, was the proximate result of a conspiracy on the part of any or all of these defendants, if such conspiracy did exist; fifth, that there was no damage suffered by the plaintiff which is measurable; that all of the plaintiff's damages, and particularly all of those damages which could be traced to any conspiracy having any effect upon interstate commerce, [1213] are speculative, uncertain, too speculative and remote and uncertain to be measurable and to be submitted to the jury; and, finally, that on the ground that, assuming any conspiracy did exist, such conspiracy as shown on the evidence and the record so far is a conspiracy which is not a violation of the Anti-Trust laws because of the provision of the Clayton Act, I believe it is, or the provision of the Anti-

Trust laws, which provides that the labor of the union, a human being is not an article or commodity of commerce. My grounds in that connection are that this is an alleged conspiracy directed toward the furnishing of labor and for no other purpose, and it is not covered by the Anti-Trust laws.

Mr. Vance: If the Court please, I think I should add just one thing. In both causes of action, the Court's jurisdiction rests upon the jurisdictional statute relating to acts based upon commerce and insofar as the acts, both statutes involve the Anti-Trust act and the Labor-Management act, which are both bottomed on commerce. Of course, my motion would go as well to the insufficiency of the evidence to sustain the jurisdiction of the Court on commerce.

The Court: Yes. Of course, it is my understanding of it that interstate commerce has a much broader meaning and reach in the case of the National Labor Relations Board than it does in a case of the Sherman-Clayton acts. [1214]

Mr. Vance: No question about it.

The Court: Yes. If it indirectly affects commerce—well, I needn't go into that, but I just was going to ask you if you are going to argue on both causes of action or will you very largely, you think, adopt Mr. Burdell's argument as to the second cause of action?

Mr. Vance: Well, we had rather thought this, your Honor—

The Court: Pardon me for interrupting, but you do have this difference, that I think Mr. Bur-

dell's clients could be dismissed out of this action and still hold you labor people unless the law is such as to not warrant it. In other words, you have got enough to constitute a conspiracy with these individual labor representatives and officials and the Union itself. I don't know whether I make myself clear.

Mr. Vance: I think you do, your Honor.

The Court: Yes, you could exclude all these employers entirely and, under some circumstances if the proof were there, you could have a conspiracy which consisted of the business manager and the business agent and the unincorporated association of the Union itself conspiring to violate the Sherman Act.

Mr. Vance: Yes. Which, of course, I would argue. Yes, I understand. [1215]

The Court: My only point in saying that is you do have that difference. I hope you don't overlap too much.

Mr. Vance: What I had planned to say was Mr. Burdell and I took up this matter and, naturally, being here in Walla Walla by ourselves, we have worked together. Mr. Burdell, if it pleases the Court, for this agenda will open the argument. There is no way of segregating or dividing, I do not believe, the argument on the Anti-Trust. Every time you start to argue one facet, you run into all facets, as your Honor knows. I plan on letting Mr. Burdell assume the burden of making that argument and the only thing I will try to do is fill in if I think he has missed something or if your Honor suggests there is something peculiar to my clients.

The Court: I think we should have some understanding about the time. This could go on and on and on.

Mr. Vance: Well, I think that on the defendants' side I don't see how we can argue it in less than an hour and a half.

The Court: Well, I am not going to hold a night session. I suppose I should have excused the jury until tomorrow afternoon. It is too late for that now. I didn't realize it was so late here.

I wonder if it wouldn't be better, if counsel has no objection, if we met at 9 o'clock in the morning and [1216] start this? I think an hour on a side should be enough here.

I want you to bear this in mind, Mr. Vance, that you weren't in the case at that time, but so far as the law is concerned, I think almost identical questions here were argued at great length, exhaustively, to the Court in Yakima. Mr. Molthan represented the Union and Mr. Burdell represented the employers and many of these same cases he is going to argue tomorrow on this have already been argued in Yakima, and at that time I said that I didn't like to decide it on a motion to dismiss on the pleadings, that I would rather wait until the proof is in, so I am not coming into it cold and I have read most of the cases that you have cited to me, so I think you should be able to make your points——

Mr. Vance: I may be over-pessimistic. I have a transcription of one of the arguments before your Honor; I believe there were two.

The Court: Weren't there two different occasions, Mr. Burdell?

Mr. Burdell: Yes, your Honor, there was a motion to dismiss the original and then the amended complaint. I have one, but I don't have both.

The Court: I don't know whether there was a transcript made of one of the arguments or not, but would an [1217] hour be sufficient on your side, do you think?

Mr. Gladstone: I am sure it would.

Mr. Burdell: I wouldn't want to bet it wouldn't take at least an hour.

The Court: Beg your pardon?

Mr. Burdell: I don't think we could in justification to our clients present this matter, these motions, in less than an hour and a half. We might do it in an hour, but we would have to be going awfully fast. We would try and attempt to. I mean we may come to points that the Court might say, well, it is satisfied about this point or that point or makes some indication that it is so dissatisfied with that point, go on to something else.

The Court: If you find you are not having enough time, I can always extend it and give the other side an equal amount, of course. Looks like it might take all forenoon if we meet at 9, but I will have the jury coming back in anyway.

I will adjourn then until 9 o'clock tomorrow morning and start the argument then.

(Whereupon, the trial in the instant cause was adjourned until 9 a.m., Thursday, January 17, 1957.) [1218]

January 17, 1957, 9 o'Clock A.M.

(Whereupon, the trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had out of the presence of the jury:)

The Court: I am going to shorten this argument as much as possible, give both sides an opportunity to argue the matter fully, however, so far as any question, any doubt, is concerned.

We all know, of course, that at this stage of the lawsuit the only problem the Court has is to determine whether or not there is any evidence or reasonable inference from the evidence here on which a jury could find a verdict in favor of the plaintiff, and that is viewing the evidence in the light most favorable to the plaintiff.

So far as the first cause of action is concerned, I am inclined to think that there was a duty to furnish men under the contract, and I don't think that that need be based solely upon the closed shop provision of the contract, that the employer was required to get his labor supply from the union. I think that the Court may properly take into consideration the attendant circumstances and the background and the situation that led up to the making of the contract [1219] and the evidence here which the jury could believe is that there was no supply of skilled labor, the welders, which the plaintiff would need in order to perform his subcontract with Hopkins in the Tri-City area except through

the Union. That is the only place he could get his men. He couldn't perform the contract unless he got them and, with full knowledge of both parties, he went to the defendant Union and told them, "I will have to have an arrangement to have men from you or I can't get this contract, Hopkins won't give it to me," and on that basis the Union gave him his contract. He had nothing to say, he was helpless, he had to take what they gave, and they gave him this contract which had the closed shop provision in it, and then I think it could reasonably be inferred from all the circumstances here, which I shall not detail, that there was a failure to furnish men to the plaintiff on the job, at least there is a question there, I think, for the jury to determine, and I don't like to base it on the principle of estoppel, but maybe a second cousin to it, I don't think they should be permitted now to say, "This contract, which we gave you and which we required you to take and which you had to have in order to perform your contract, we now claim that there was an illegal provision in it and we are going to take advantage of that illegal provision and prevent you from recovery," so I will hear you gentlemen on the second cause of action. [1220]

Go ahead, Mr. Gladstone.

(Whereupon oral argument was made to the Court by all counsel dealing with the second cause of action, after which the following proceedings were had:)

RULING ON MOTIONS

The Court: I am always reluctant to in any way invade the province of the jury. Where the parties have demanded a jury trial, they have a right to a trial of any issue of fact by the jury, and unless I am very clearly of the view that there isn't any substantial evidence or reasonable inference from the evidence on which a verdict could be based, I usually submit the case to the jury. However, I don't think it is proper for a judge, if he is convinced that there isn't a jury issue, to do what one of my lawyer friends suggested that I do not long ago, submit every case to the jury and then maybe the jury will solve my problem, won't have to pass upon the sufficiency of the evidence, but some years ago I did just about that and the jury came out with the wrong answer and I was obliged to set aside the verdict, and I think one of the jurors properly complained to me. He said, "Why in the world did you submit this case to us when you knew all the time that if we returned a verdict for the plaintiff, you would set aside the verdict?" and I think that is a legitimate complaint. I think it is the judge's duty to view the evidence before the case is submitted to determine whether [1221] there is a jury question or not. And in this case, I think that I have allowed wide latitude to the plaintiff, I am aware of the fact that a conspiracy usually must be proven by substantial evidence, and on most of these contested questions I thought I was quite liberal with the plaintiff and allowed them wide latitude in

bringing in everything that they could here to show a conspiracy under the second cause of action, and I just don't think it is thick enough. It just isn't thick enough.

There isn't evidence here on which any trier of the facts could find properly a conspiracy in this case. And I have in mind, as I mentioned awhile ago, if these men are guilty of violation of the Sherman Act, which would make them liable in treble damages on the civil action, they have committed a criminal offense for which they could be indicted and, of course, I have in mind that in a criminal case the degree of proof required is proof beyond a reasonable doubt, rather than proof by a fair preponderance of the evidence, but at this stage I am in exactly the same situation here now as I would be if these men were under indictment and I faced the question of whether I should submit to the jury the question of whether they should be found guilty of a criminal offense, and can you imagine any court sustaining a felony conviction against Randolph and Mokler, particularly, on this evidence that has been submitted here? [1222]

I know that the jury is entitled to draw reasonable inferences, and where there are two that may be drawn, one pointing toward liability and the other not, that the jury is the one to draw the conflicting inferences, but I think also that we are obliged to assume, until the contrary is shown or until a reasonable inference to the contrary may be drawn, that people act from decent and proper motives, and we can't certainly base a verdict or

permit a verdict to be based on speculation and conjecture that while somebody, while they appeared to be acting properly and in good faith, could possibly be acting from bad motives and be carrying forward some undercover conspiracy.

What I have in mind is here that these men, according to this evidence, Mokler, Head and Randolph attended this meeting of the 29th. Whether they were actually legally members of the conference representing the employers or not, the evidence certainly is, there is nothing to the contrary, that they thought they were and were assuming to act. And Mokler didn't stir this thing up, he didn't volunteer to go, he was called and asked to substitute for somebody who couldn't be there, and there is nothing to the contrary here and these men went down ostensibly acting in a conference as representatives of the employers to inquire into the contract which had been [1223] questioned, and they were lawfully there for a proper purpose, and I don't think that we should go out of our way to assume that it was a product of some deep, dark conspiracy.

So far as Mr. Head is concerned, there are statements that he made there from which the jury could infer that he might have had a purpose to keep Dillion from getting the men that he needed on the job, but it hasn't apparently been in the argument here, wasn't seriously questioned, that under *Hunt v. Crombach* the Union would not be guilty of violation of the Sherman Act for refusing to furnish labor to an employer, even though that arrangement

is, as Mr. Vance pointed out, an arrangement and contract with one employer.

Now, if the Union can't be guilty of conspiracy under these circumstances here, and I am convinced that that is true under *Hunt v. Crombach*, then we have got, assuming that the evidence is sufficient as to Mr. Head, one conspirator here, and, of course, as everybody knows, you have to have two, you can't have just one conspirator.

And on the factual evidence here, I am not going to go into it in great detail, but I have listened attentively and have scrupulously made notes on everything I thought could be brought to bear here and bring in Mr. Randolph and Mr. Mokler into this case, and I just don't [1224] think it is sufficient to show that they were joined or created or participated in a conspiracy with anybody else to keep Mr. Dillion from getting the men he needed to perform the Hopkins contract.

Now, we have, too, I think, the serious question of whether there was a substantial restraint of interstate commerce here and I think that Mr. Burdell's argument was, in the main, sound on that. I am not going to try to reiterate it or even summarize it. As I think I indicated in my remarks from the bench here, I can't see where the Hopkins contract could possibly involve a restraint of interstate commerce as it is defined for purposes of the Sherman Act in the decisions.

The pipe was furnished; all that the contract called for was welding it and putting it into place;

and I thought it was very significant the length to which counsel for the plaintiff was required to go in trying to meet the Court's objections or comments from the bench in suggesting that the supplies that were used in welding pipe could be the subject of substantial interstate commerce which would be restrained in this case. As a matter of fact, of course, so far as the Hopkins contract and Dillion were concerned, there wasn't one ounce of interstate commerce that would have been any different whether Hopkins did that job or whether Dillion did that job. Just exactly the same [1225] number of ounces of materials move in interstate commerce and did move when Thorn and Marble did the job as if Dillion had done it, so that there wasn't any substantial restraint of interstate commerce so far as the contract is concerned, and there are two things I think wrong with saying that because Mr. Dillion says he intended to go into the pipe fabrication business, that keeping him from doing so would restrain interstate commerce:

I don't think that future intentions of one engaged in an industry can be regarded as actually affecting interstate commerce, and another thing that I think is wrong with that is that I don't recall any evidence here that any of these men who I might designate as the employer defendants had any knowledge that Mr. Dillion contemplated going into the pipe fabrication business before this meeting of the 29th. Certainly not more than one of them, I should say, has been shown to have any such knowledge, I don't know that there is any

evidence that any of them had knowledge, and if you assume they were in a conspiracy, it was a conspiracy to keep Dillion from getting men to perform his contract with Hopkins and it certainly would be going a long way out into the woods to assume that they knew and could reasonably contemplate that if they kept Dillion from getting welders to perform this little contract, that it would put him out of business, that his financial condition was so [1226] shaky, that this one contract, losing it would cause him to have to close up his fabrication business and fold up his tent and to go out of business entirely in the Tri-City area.

Now, I think a third consideration here is that there must be shown an injury to the public, as well as to an individual, and that the Sherman Act has as its primary purpose the protection of the public against monopolies and against stifling competition in interstate commerce, and that is, I think, indicated by the treble damage provision. The reason that a private individual is given treble damages if he proves violation of the Sherman Act which causes him damage is to aid in its enforcement. It offers a reward to people who will get out and bring actions that will enforce the law, but it is an enforcement policy in the aid or in furtherance of the public interest which is regarded as of primary importance.

I think a case that bears that out, and I will not read at great length from the opinion, but the case of Feddersen Motors v. Ward, which is a 10th Cir-

cuit case reported in 180 F. (2d) 519, and reading from page 521 the opinion states:

“Its primary purpose——
that is, the Sherman Act——

“Its primary purpose was to prevent undue [1227] restraints of interstate commerce in the public interest, and to afford protection of the public from the subversive or coercive influences of monopolistic efforts. The right granted to individual suitors to seek reparation was secondary and subordinate in purpose.”

And then again on page 522:

“And in a case of this kind brought by an individual suitor for the recovery of three-fold damages, it is essential that the complaint allege a violation of the Act in the form of undue restriction or obstruction of interstate commerce and damages to plaintiff proximately resulting from the acts and conduct which constitute the violation. But injury to plaintiff alone is not enough upon which to predicate such an action. There must be harm to the general public in the form of undue restriction of interstate commerce.”

And here it seems to me you have, assuming that the evidence is sufficient to show a conspiracy to put Dillion out of business, only one small operator involved and not the damage to the public which I think would be essential in a [1228] case of this kind.

Now, counsel seem to rely heavily on this so-called Las Vegas case, Las Vegas Merchant Plumb-

ers Association v. United States, but there we have a far different situation from the one in this case, and I think I can illustrate that by reading briefly from the opinion. That is a 9th Circuit case that is reported in 210 F. (2d) 732. It was a criminal action in which the question involved was the sufficiency of the indictment to state an offense in violation of the Sherman Act, and the allegations of the indictment are summarized in the opinion beginning on page 738, as follows:

“In summary it (the indictment) alleges: Practically all plumbing and heating supplies used in southern Nevada are manufactured in other states and are sold and shipped in interstate commerce into Nevada. Plumbing contractors then distribute, sell and install these supplies and make a charge and obtain a profit from both the selling and installing; over three-fourths of all such supplies so used in southern Nevada are distributed, sold and installed by plumbing contractors who are members of the defendant association and [1229] defendant Exchange, and a major part of all such supplies are distributed, sold and installed by the defendant plumbing contractors. The service performed by plumbing contractors in distributing, selling and installing such supplies is an integral part of, and necessary to the movement in interstate commerce of such supplies; plumbing contractors are conduits for such movement, such supplies flow in a continuous, uninterrupted stream from points of origin out of state to places of use and installation in southern Nevada.”

Now, here is the offense that was charged here, what it is alleged that the defendants did in the indictment to violate the Sherman Act. First it recites the general terms:

“The indictment alleges that beginning in August, 1950, and continuing until the return of the indictment the defendants named and others unknown, have conspired to unreasonably suppress and eliminate competition in the sale and distribution of plumbing and heating supplies in restraint of the interstate trade and commerce.” [1230]

It then describes what they did:

“It then describes a scheme to fix prices and to divide the available market by the employment and use of an ‘estimator’ who would figure a plumbing job and fix the price, to which the plumbing contractors would adhere. If two or more plumbing contractors were to bid on the job, an allocation committee would designate who should submit the lowest bid. Complimentary and fictitious bids at higher prices would be used. To enforce compliance with and adherence to the plan, defendant Alsup would induce journeymen and apprentice plumbers not to work on any job for any plumbing contractor other than the one designated; that wholesalers would be boycotted if they sold or offered to sell such supplies at prices and terms not agreeable to defendant plumbing contractors.”

There we have a conspiracy among a group of people in the plumbing contracting industry who controlled a substantial proportion, percentage, of all of the trade and industry in southern Nevada,

a conspiracy to fix prices, to allocate jobs, to boycott wholesalers who didn't deal with them, to control labor supplies, which is certainly a far cry from [1231] any conspiracy, assuming that it has been proven, to keep one small contractor in the Tri-City area from getting men to perform a particular subcontract involving, I think, a \$30,000 job.

Now, I try to decide the cases on my own without any regard to what an appellate court will do, I think any trial judge that is worth his salt does, but I think I can say this, that I think if I let this case go to the jury on the second cause of action and a substantial verdict were returned, which the plaintiff hopes for, that it would be a doubtful kindness to this plaintiff, because if I were estimating for Lloyds of London and representing them—I understand they insure almost anything—I would offer very, very heavy odds that a verdict on the second cause of action would be reversed by the Court of Appeals of the Ninth Circuit.

So that the motion will be granted as to the second cause of action.

Now, I don't know what you had in mind, Mr. Burdell, you are principally interested here, I presume, if you wish to prepare a directed verdict. I think the procedure that I have followed on a directed verdict, there are two ways of doing it. You can send the jury out and tell them to bring in this verdict, or I can appoint a foreman and direct him in open court to sign a verdict. [1232]

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: As you probably have inferred, ladies and gentlemen of the jury, there has been a great deal of argument on law questions here since I last excused you. I believe I told you at the outset of this case, at any rate it is an instruction that I usually give, that the Court, that is to say, the Judge, and the jury have entirely different functions and different duties that complement [1239] each other in a jury trial. The jury is solely responsible for deciding questions of fact that arise on the evidence that is introduced for your consideration; the judge is solely responsible for deciding questions of law.

Now, as was pointed out to you in the opening statement of counsel here, there are two causes of action which the plaintiff is asserting in his complaint, which is his formal pleading here, the first cause of action and the second cause of action. Now, for reasons which I need not explain or detail to the jury, purely as a question of law, the Court is directing you to return a verdict for the defendants on the second cause of action, which means, in practical effect, that the second cause of action is withdrawn from your consideration, and the case will proceed on the first cause of action, which is the action by the plaintiff, W. C. Dillion, against the Plumbers and Steamfitters Union, Local No. 598, for claimed damages for an alleged breach of contract that Mr. Dillion claims he had with the Union.

Now, this matter where the Court decides on a cause of action as a question of law, it is a mere formality for the jury to return a verdict under direction of the Court, so for purposes of this second cause of action only, I shall appoint Mr. Anderson, who is No. 1 here, as foreman and direct that he sign this verdict for the defendants on [1240] the second cause of action.

(The foreman signed the verdict.)

The Court: All right, the directed verdict as to the second cause of action signed by Mr. Anderson will be received and filed, and the jury will be excused until 1:30 this afternoon, then we will proceed at 1:30. You may step out. Court will remain in session for a few minutes.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: I think that in cases of directed verdict, the same as any other instructions, that counsel should have the privilege of taking exception in the absence of the jury to the Court's instructions, and you may do so now at this time, if you wish to, for the record.

I assume that the plaintiff will except on the ground that the direction of the verdict is improper, but have you anything other than that, Mr. Gladstone?

Mr. Gladstone: No, I would like to have the record show that the plaintiff does except to the direction of the verdict on the second cause of action

on the grounds and for the reason that plaintiff feels that under the facts and the reasonable inferences to be gained therefrom, all of the facts and circumstances necessary to be proven to recover under the second cause of action have been shown.

The Court: All right. [1241]

* * *

DEFENSE MOTIONS

Mr. Vance: If the Court please, I have a couple of matters I think should be taken up in the absence of the jury.

One is that the defendant union, now at the close of all the evidence in the case, moves the Court to dismiss the action and for a directed verdict on the grounds of the insufficiency of the evidence and on the grounds of the affirmative defense regarding the illegality of the clause in question which we argued at the close of the plaintiff's case, and I would gather from all the circumstances surrounding this matter that the Court is not interested in argument on this.

The Court: No, I think it has been fully presented.

Mr. Vance: Then, if your Honor please, I indicated to the Court yesterday that I would have some kind [1279] of a motion concerning the striking of testimony and possibly exhibits because of the dismissal of the second cause of action.

Within the time allotted to me and the skimpi-ness of my notes, I am unable to make any motion

in that regard and do not make a motion and I am not claiming that I am deprived of any opportunity. I didn't mean to leave that in the record. I simply was trying to take any blame off my own shoulders, too, I am not in a position to make such a motion.

The Court: I am glad you mentioned that because I had in mind at an earlier time and overlooked it that I think immediately following your proposal with reference to explaining to the jury that the second cause of action has been withdrawn from their consideration, that I should instruct them to consider only evidence that bears upon the issue raised by the first cause of action and entirely disregard any evidence, whether it is documentary or oral testimony, that pertains only to the second cause of action.

It will be very difficult for me, and I think for anybody, to go through this record and weed out the ones, some of them pertaining to both, of course. There wasn't a great deal of documentary evidence, that I recall, that was exclusively on the second cause of [1280] action. One was Mr. Randolph's letter calling the conference, which would clearly be a document that would have no bearing on the first cause of action.

Mr. Vance: That is what I was leading up to was to ask the Court to instruct the jury.

The Court: I will give a general instruction.

Mr. Vance: The second thing, and this is in the nature of an oral request for an instruction, is the Court has indicated refusal of one of our proposed instructions, but I do move the Court to instruct

the jury that in assessing damages it may not consider any prospective profits of any job other than the Lewis Hopkins contract. I think that any general instruction that permitted them to do that would permit them to——

The Court: I think you are entitled to that. First, I had in mind giving your instruction, then I thought it was a little too strong on the exclusive side here, but I think you are entitled to that instruction.

Does counsel wish to be heard on that?

Mr. Gladstone: Yes, your Honor. We feel that one of the specific items of damage, it is an overall item, is the matter of the loss of the entire business.

The Court: Well, that is a different matter, loss of an existing business, but you certainly can't contend that if the plaintiff here hadn't been put out of [1281] business, as you contend he was, that he could have bid on and got contracts with the Atomic Energy Commission. Possibly he might have got a big contract like Kaiser did and have lost prospective profits running into the millions. That is something that surely wouldn't be the basis of damages.

Mr. Gladstone: I mentioned his loss of business just as a preamble for the reason why we felt that it tied in. We feel that the jury should be instructed to determine the damages that reasonably flow; that in determining the value of the business, they could consider the contacts that he had made, whether or not it would be reasonable that he would have continued in business for any period of time that was within reason and might reasonably could

have expected, considering the tools, the equipment that he had, the background that this man had, and the contacts that he had made, all of these things, just whether it would be reasonable for him to have continued in business, which would be an item appropriate for their consideration in determining the overall value of the business that he lost.

The Court: And would have got a construction contract for a million and a half dollars on which he might have made a profit of \$500,000 and, therefore, \$500,000 would be reasonable for the jury to award. [1282]

I will tell you, a verdict based on that kind of instruction, the verdict wouldn't be worth a plug nickel to you, the Court of Appeals would reverse it so fast you would have it right back here again, and I think I ought to instruct the jury that they shouldn't consider prospective profits on contracts which he doesn't have which he might get in the future. That doesn't keep you from arguing the business loss and what his prospects were on that.

Mr. Gladstone: May I ask, then, if our argument was along the line that I have outlined, would I be outside the instructions?

The Court: No, as long as you keep away from the profits which he might have earned on contracts which he might have procured had he stayed in business and which he didn't have at the time he quit.

Mr. Day: I was thinking, your Honor, of alluding, for instance, to the testimony of all of the

adverse witnesses that there was a great demand or need for fabricators, subcontractors.

The Court: Well, that is business prospects in the light of the circumstances there. I don't think that that would be out of line.

But what I have in mind is, and I think what counsel perhaps has in mind or what I understood from [1283] his proposal, that you couldn't count profits that he might have made on construction contracts which might have been awarded to him and on which he might have made a future profit had he stayed in business.

That isn't so difficult to understand, is it? It isn't to me, anyway.

Mr. Vance: That is what I had in mind.

The Court: I will give enough of your proposal to cover that. I don't want to take any more time than we have to here. Not going to finish by noon if we don't hurry here. You have an hour on a side, take half an hour to instruct the jury, if we don't get started pretty soon, we won't finish this before lunchtime.

Mr. Gladstone: Your Honor, if Mr. Vance is through, I would like also to make one additional inquiry because I don't want to get outside the instructions.

The Court: Yes, all right.

Mr. Gladstone: The matter of arguing attorney fees to the jury, would the Court consider that to be appropriate?

The Court: You mean attorney fees to be allowed to the plaintiff?

Mr. Gladstone: Yes.

The Court: I am not sure that I understand you. You are entitled to reasonable attorney fees under the [1284] Sherman Act, but you are not on this first cause of action, are you?

Mr. Vance: That is my impression.

The Court: Yes, I know of no provision in the National Labor Relations Act that gives you a reasonable attorney fee where you are suing a union for breach of contract. On the second cause of action, yes, you would be entitled there to reasonable attorney fees.

Mr. Vance: Yes, there is no provision, as far as I know, in the Labor-management contract. It leaves the common law of damages.

The Court: Of course, if you have in mind telling the jury, "You ought to give the plaintiff a good round sum because we are going to take a big bite out of it," no, that isn't proper argument.

All right, bring them in.

* * *

OPENING ARGUMENT

By Mr. Gladstone:

May it please the Court, ladies and gentlemen of the jury:

We would thank you, and I am sure all involved [1285] thank you, for the time that you have given us here, two weeks of your time. If you haven't had jury time before, served on a jury, you appreciate that the time that you have given is time

devoted to a service that every citizen in our country is entitled to. When there is a dispute, it can be settled, they seek redress in the courts and ask that the dispute be settled. They submit it to the court or they ask for a group of fellow citizens and they submit the dispute to them. They say, "Here are the facts as we see them;" the other side says, "Here are the facts as we see them;" and they ask you folks to determine who is right and who is wrong, and we have reached that point in our proceeding here. We have taken two weeks of your time that you have given under this jury system to settle the dispute between these people.

Now, on this cause of action that we are submitting for your consideration now, it is a breach of contract action. You have before you the evidence as to the agreement, the specific agreement that we claim has been breached by the union with Mr. Dillion, the agreement being that they were going to furnish him men. You understand the circumstances that led up to this, that he was seeking men, he wanted to set himself up in business; realizing that the type of business that he was going [1286] into was of a type that he would need qualified trades people, qualified welders, qualified fitters, to do his work; that the source for these men was the union there at Pasco in the area where he wanted to go into business; that he informed the union, union officials, of his desires in this respect. They were well informed of what he wanted to do. He informed them even specifically of the

job that he wanted to do, that is, the job out with Lewis Hopkins that has been testified to.

Now, then, you are also as familiar with the circumstances as any of us as to what they did. You know that he made endeavors, certain endeavors that have been testified to, to obtain men. You have heard the evidence as to the date that the agreement was signed and which, although it is somewhat in dispute, was at least on or before the 22nd of November. Some evidence that it was signed before that date, but in any event it was signed by the 22nd and picked up by him on the 23rd, and it was on that date that he started his endeavors to obtain men. It was on that date that he firmed up his contract with Lewis Hopkins and actually needed the men and he commenced his endeavors at that point to obtain men, contacting first one man and then the other, until finally he brought in his own brother. After a week of trying to get men from the union, he brought in his own [1287] brother, Al Dillion, from Texas, brought him up and got him dispatched from the union. The union could hardly refuse to dispatch that man, and they dispatched one more, one more man, who testified yesterday, Mr. Meler. He worked for him one day, and I would ask that you consider all of these circumstances and the background there existing on the matter of whether or not Mr. Meler, at the time he was dispatched and at the time he left, was actually in good faith going to go to another job down in Oregon. Consider the position that the union had taken regarding Mr. Dillion's contract

prior to that time; that is, in the week preceding the dispatch of the two men; consider the many contacts that Mr. Dillion made during that period of time, and consider also in this respect the records there of the men that were dispatched. You have the dispatch books, consider the many men that the union dispatched and sent out on these jobs at the very time when Mr. Dillion was attempting to get his men.

These are the things that we are submitting to you and saying here is the agreement, this is what they agreed to do, this is what Mr. Dillion did trying to get them to live up to their agreement, and this is what they did, they did not live up to their agreement.

Mr. Dillion had for many months been building up to this time when he could go into business. He was a [1288] man that had followed his trade a long, long time. He had built up the equipment, he had built up what he felt was the experience, and he was going in to the union just asking one thing, "Give me a fair shake. Give me a fair deal like you give these other people." That is what Mr. Dillion wanted, and we submit that the facts that we have shown you here indicate that Mr. Dillion did not get a fair deal; we submit that the facts show he did not get men; because he didn't get his men, he lost his investment in time, in money, and in his endeavors in building up his business. We have itemized these before and I am just going to recap them.

First, he invested in the bond that he was re-

quired to put up. He made an investment there, he paid a premium on it. He bought his necessary supplies, payroll checks, paid for his phone, his rent, his insurance. There are exhibits in here of those, you will have those, you can look at them. They will confirm the fact that he did make these expenditures totaling \$207.58.

He also drove a number of miles in acquiring his equipment and his materials. He made a number of contacts, necessary contacts, to the business that he was going into, and I hope that your memory is better than mine because I lost my notes on what he testified to, but you will check in your own mind those figures. As I [1289] can best recall, the miles were 3,000 and he indicated to you that his opinion as to the value was ten cents a mile, which would make it \$300. And his hours spent again on this mileage, I would have you check me in your own mind, your own memory, but my recollection is that it was 500 hours, and his opinion was his time at that time was worth five dollars an hour, or \$2,500.

Now, you also have before you the agreement that he had with Mr. Hopkins. You know that, first of all, there is a work status chart by Mr. Hopkins that is in the file. There are two items there. One is welding of pipe and he has an estimate on that of \$23,000; there is an item there for placing of pipe, \$19,000.

Now, you will recall in the deposition that we read of Mr. Thorn that he stated—Thorn and Marble, you recall, is the firm that completed the contract that Dillion had and you will recall that

it was testified by Mr. Thorn that all their firm did was weld the pipe. They didn't handle it, they didn't place it, they didn't string it in line for welding. All they did was weld it and that would be this figure here, he did it for \$13,000. This is the additional work that Mr. Dillion was going to do under his agreement with Mr. Hopkins.

So we submit if he had done it according to the estimate—of course, I shouldn't say that Mr. Dillion [1290] was going to do it all, because I do feel that Mr. Hopkins qualified this to a certain extent when he said that this was a composite job—that Mr. Dillion, he and others, were all going to take care of the matter of placing—but I would submit here that Mr. Dillion's expense and his contribution had he done that would have been \$10,000. I don't feel we are getting to the realm of speculation there. I feel that you can take into account what Mr. Hopkins said about the contribution that each was to do on the composite job of laying and placing the pipe.

Then you have a total of \$23,000, and what per cent was Mr. Dillion entitled to of that amount? You have two figures submitted to you. Mr. Dillion informed you that the percentage that he was entitled to, or would have been entitled to, under his contract with Mr. Hopkins was 25 per cent. You will find, if you have not already noticed it, that that figure was blank in the contract and you will have to determine which is the correct percentage, whether 25 per cent, as testified to by Mr. Dillion, or 15 per cent that Mr. Hopkins testified to. You

will recall that Mr. Hopkins prefaced his statement as to the percentage by saying, "I want to change my statement in my deposition and say that it was 15 per cent." Now, we submit that the appropriate percentage, [1291] the percentage that they had actually agreed upon, was 25 per cent, that it was one-fourth, and that Mr. Dillion then would be entitled to one-fourth of \$23,000 as his percentage of that contract, \$5,750.

Now, this, we say, is what Mr. Dillion was out, what he had actually invested, as I say, in time and in money and in his own endeavors up to this point, and the amount on the contract. The reason I am including that here is because we feel that the contract was established. You don't have to speculate as to whether he in his business venture here could have possibly gotten a contract; you do know that he did have a contract. That is why I am including this in what he had accomplished in his business. This, we say, would be that total.

Now, in addition, there was an investment in equipment. You recall that he bought welding machines, a generator, a truck, a pickup, and he improved the pickup, he bought a torch, he bought dies, he bought tools and skids, and his total investment there was \$3,069.50. He sold much of this equipment and he realized from the sales \$2,350. This, we submit, is what he was out of pocket in the sense that I have spoken to you about.

Now, in addition to this, what Mr. Dillion actually lost was, as I mentioned previously, his [1292] business. When they cut him off from men, he made

endeavors to get men by repeated contacts not merely with the Business Agents, but he went also to representatives of the Atomic Energy Commission, he called the National Labor Relations Board, he went to the highest local representative of the union, Mr. Bilderbach, of the International. He contacted all of these people, was on the go continuously day after day trying to get men, and it was this that cut him off, not merely from what he had here, but cut off his business entirely, and we submit that he is entitled to recover the value of his business at that time. They cut him off, he lost his business, not a business that had just been in operation for a day, but had been in the process of being built up for many, many months. When you consider the period of time that he actually had his agreement with the union and the period of time when he was cut off entirely, it would appear that his business operations were very short, but when you consider that he was building up a business for a long period of time, he was making acquisitions, making his contacts, getting ready to go into business, you will see that his business operation actually had built up to substantially more at that time than a few days operation. And it is on that basis that we submit to you that you should determine the fair value in your own [1293] minds, the fair value of Mr. Dillion's business at that time, and I think that you can use these figures as a guide, particularly when you consider that here Mr. Dillion had a contract with Mr. Hopkins and had he been able to complete it on the basis that we have submitted, he would

have made \$5,750 on his percentage. You know the contacts that he made, the various people that he talked to, these things you should run over in your own mind to determine how reasonable they are, that is, I mean whether it is reasonable to make them, but was it reasonable for having those things in mind that his business would have continued, understanding the contacts, keep in mind the equipment that he had, keep in mind the place where he was, the intending to operate, keep in mind all of the comments that were made about the type of business that Mr. Dillion wanted to go into, consider all these things as to whether or not Mr. Dillion had a business that had a future, at that time whether or not it was a business that had any real worth, and we submit that that is the figure that you must arrive at here, that is a fair figure as to the value of Mr. Dillion's business here.

Now I am going to put down a figure. I am going to ask you in your own mind to determine, keeping all of those factors in mind, what was the value of Mr. [1294] Dillion's business at the time they cut him off.

Now I would want to just say this in concluding, that, as I mentioned at the outset, Mr. Dillion sought what was fair. You are being asked in one of your instructions here to determine, if you find for Mr. Dillion, what is fair. That is all he has asked of the union, that is all he asks of you, that you give him fair consideration.

Thank you. [1295]

INSTRUCTIONS

The Court: Now, ladies and gentlemen, it is almost noon but I think it is best for all concerned for [1314] me to go ahead and give my instructions before we sent you out to lunch and then you have the case and will be ready to start deliberating as soon as you get back from lunch.

It is the duty of the judge in a case of this kind to instruct the jury on the rules of law which you are to follow, and it is the exclusive function and duty of the jury to find the facts and, of course, those facts should be found only from the evidence that has been admitted for your consideration, the oral testimony and the documents that have been admitted as exhibits.

For those of you who have served on juries in the state court, the state courts, I think as counsel pointed out, the procedure is somewhat different. In the state court the judge not only instructs the jury in advance of the argument, but the instructions are settled and typed out and copies of them are given to the attorneys and a copy is given to the jury when they retire to the jury room. That isn't done in Federal Court. In Federal Court the judge instructs after the argument and he doesn't give the jury, as a rule, at any rate, and that is the procedure in this court, doesn't give the jury a typed copy of the instructions which they may take with them. Of course, a very obvious reason for that is a Federal judge, if he saw fit to do so, could give [1315] his instructions wholly orally, off the

cuff, as I am doing now. That is the way I would like to give them, as a matter of fact, but it isn't practical for a number of reasons. One of them is that I am charged with the duty of instructing you fully and accurately concerning these various rules of law as to the issues, what the burden of proof is and what the parties have to prove to be entitled to a verdict, the measure of damages, and such as that, and for the sake of accuracy and completeness, I find in my case, at any rate, I feel safer if I write them out and know in advance that I have them accurately stated and in accordance with the rules of law, as I know them and understand them, and also counsel are entitled to know, and the rules so provide, they are entitled to know what the court is going to instruct on these various matters and various issues before they argue so that they can frame their argument accordingly, and that is the reason the attorneys can predict to you so accurately what the court is going to instruct, because I call them in, out of the presence of the jury, and discuss these instructions with them. They are privileged to make proposals to me, I adopt many of their proposals, have instructions of my own, and when I finally make up the set of instructions I am going to give, I tell the lawyers what I am going to do so that they can [1316] govern themselves accordingly in the argument.

Now, also, there is a strict rule against a judge in the state court commenting on the evidence. He would be subject to reversal if he commented on the

evidence or otherwise gave the jury his view of what the issues were. That isn't true in Federal Court, a Federal Court judge is privileged to comment on the evidence, but any comment I make about the evidence or the issues, telling you what they are from my understanding, you are not bound by that at all. You may consider it just the same as you would consider the argument of counsel, if you think it is sound; if not, you can entirely disregard it, you are not bound by it, but as to these formal instructions which I will give you on the law, you are bound by them, it is your duty to follow them, to assume that I know what I am talking about, it is your duty to assume they are right, and follow them and apply them as best you can to the evidence.

Now, before I start these formal instructions, I think it might be helpful for me to just give you my idea of what the issues are here, considering that there is little, if any, dispute as to many points which the plaintiff has the burden of proving. Your task is considerably simplified because of the removal, and I will comment on that later on, of the withdrawal from your [1317] consideration of the second cause of action. We have only the first cause of action, which is the one, as counsel pointed out to you in argument, for a claimed breach of a collective bargaining agreement between the plaintiff, Mr. Dillion, and the defendant union.

Now, there isn't any serious question about there being a contract. The contract is in evidence here and we have this contract, which isn't disputed, entered into between Mr. Dillion and the union. It

isn't seriously disputed either that under that contract it was the duty of the union to furnish men to Mr. Dillion on his job with Hopkins, if the men were available, and to furnish them within a reasonable time under the circumstances.

Now, it isn't seriously disputed, is it, that the men weren't furnished out there, Mr. Dillion's contract was cancelled by Hopkins, and he lost the job because he didn't have the men to man it?

Now, you have got two questions to answer from the evidence and the Court's instructions; one, was the union responsible legally for the failure to furnish the men to Mr. Dillion, and you consider that in the light of the instructions which I shall give you and the evidence in the case, and if you find that the union was responsible, then how much was Mr. Dillion damaged and [1318] what amount should be given to him by way of damages.

Now, let me point out again, on any comment of that kind you are not bound at all by my remarks, but I will now proceed to give you the instructions on the rules of law.

This action was commenced by a written complaint filed by the plaintiff. In response thereto, the defendants filed their answer denying the allegations of the first cause of action in the plaintiff's complaint. The statements in these pleadings are not evidence and should not be regarded as such. The Court will now summarize the pleadings as to the various allegations or claims or contentions, which mean the same thing, which have not been withdrawn.

The plaintiff alleges or claims that the defendant Plumbers & Steamfitters Local 598 represents employees who were employed generally in the plumbing and steamfitting industry, and that W. W. Cape, Rudell Beames, and William Lawson are members of the union and Business Agent or Assistant Business Agents of the union. He alleges that the local union represents employees in an industry which affects interstate commerce as defined in the Taft-Hartley Act, which is a Federal law dealing with certain activities of employers and employees. Plaintiff further alleges that he commenced negotiations with [1319] defendant local union, through its Executive Board and Business Agents, commencing on approximately June the 1st, 1954. These negotiations were purportedly for the purpose of obtaining a collective bargaining agreement from the local union, and the plaintiff contends that such a collective bargaining agreement was necessary in order to obtain a source of supply of employees which would be used in the plaintiff's proposed business of fabricating and installing pipe and that such employees could not be obtained from any other source of supply than the defendant local union. Plaintiff also contends in his complaint that certain requirements were set up by the defendant union and its representatives as a condition to the obtaining of such collective bargaining agreement by the plaintiff and that, in fact, the plaintiff did comply with all of the conditions required by the union.

The plaintiff alleges that he established himself in a pipe fabricating and installing business and

that in such business he would have been required to furnish 75 per cent of the pipe fabricated and installed by him under contract with other persons and that at least 40 per cent of such pipe would have been furnished and obtained from without the State of Washington and shipped across state lines according to the plans and as is usual in such business. [1320]

Plaintiff alleges that he entered into a contract or collective bargaining agreement with the defendant union on November 22, 1954, and that by reason of this agreement and a mutual understanding of the parties, he was entitled to obtain men from the union to be used in carrying on his business activity as a pipe fabricator and installer. He alleges that the union commenced the furnishing of the men pursuant to the demand of the plaintiff, but plaintiff alleges that the defendant refused to furnish more than two men, even though plaintiff states he informed the defendant union he would lose and suffer unless the union furnished men, which the plaintiff contends were available to go on the job for him.

Plaintiff alleges that he became an employer engaged in interstate commerce, as defined by the Federal law pertaining to the action which he has brought against the defendant union and its agents, and that the acts of the union and its agents in refusing to supply the plaintiff with men has the effect of violating the Federal law under which plaintiff has brought this action and that he is entitled to recover against the defendant union and

its agents for the losses which he alleges to be the result of the defendant union's breach of the collective bargaining contract with the plaintiff. The damages the [1321] plaintiff has alleged are in the amount of \$50,000.

Now, the defendant in its answer, in effect, denies that it breached any collective bargaining contract with the plaintiff or failed to carry out its obligations under that contract and that it did not in any way cause any damages to the plaintiff whatsoever.

The foregoing, as I have said, is merely an outline of the allegations or claims of the parties in their pleadings and you are not to take such allegations as any proof of the matters stated in them and you are to consider only those matters alleged in the pleadings, as summarized in these instructions, which are established by a preponderance of the evidence.

The plaintiff has the burden of proving by a preponderance of the evidence, one, that the plaintiff was engaged in business and that this business included transactions in interstate commerce or transactions which materially affected interstate commerce; two, that the defendant union, acting by and through its authorized agents or officers, entered into a collective bargaining contract with the plaintiff; three, that the union failed or refused to perform a duty or obligation imposed upon it under this collective bargaining agreement; and, four, that as a result of such failure or [1322] refusal to perform, if you find there was one, the plaintiff was

damaged in an amount which you can determine from the evidence with reasonable certainty.

The term "burden of proof" means the obligation to prove a fact or facts by evidence which fairly preponderates over the opposing evidence. If the plaintiff fails to sustain the burden as to any issue thus cast upon him, such issue must be resolved against him.

The term "proximate cause" as used in these instructions means an efficient cause of loss without which such loss would not have occurred. It is that cause which, in direct, unbroken sequence, produces or directly contributes or produces the loss complained of and without which cause the loss would not have occurred.

By the term "preponderance of evidence" or "a fair preponderance of the evidence" is meant that evidence on a particular matter which, when fairly, fully, and impartially considered by you, has greater weight with you, produces a stronger impression, and is more convincing to you as to its truth than that to which it is opposed, and such preponderance of evidence is not necessarily determined by a greater number of witnesses who may have testified for one party or the other regarding such matter, since you may take into consideration all of the evidence in the case no matter by which side it [1323] was produced.

Now at the outset when I just extemporaneously told you what I thought were the questions you had to answer, what were the issues here, I may have over-simplified. I think, in fairness, I should say

that I overlooked this interstate commerce angle which the plaintiff has the burden of proving, which was the first one of the items that I mentioned in my formal instructions as to what the plaintiff had the burden of proving, that is, that the plaintiff was engaged in business and that this business included transactions in interstate commerce or transactions which materially affected interstate business. That is the thing that I should have added in my extemporaneous summary of what the issues are.

Now, the term "interstate commerce," of course, means commerce between the states. In this case, it would have to mean commerce between the State of Washington and some other state. But travel by men or personnel between states for the purpose of seeking or accepting employment is not interstate commerce. For the purpose of this case, interstate commerce means the transportation of goods or materials.

Whether or not the defendant union breached its contract with the plaintiff with respect to providing [1324] men to the plaintiff must be determined in the light of all the facts and circumstances then existing. The collective bargaining agreement in this case does impose an obligation upon the defendant union to supply and dispatch men to the plaintiff. This obligation, however, is one which should be reasonably interpreted. It does not mean that the union unconditionally must provide men to the plaintiff under any and all circumstances. This obligation means merely that the union must supply men to the plaintiff as are available for dispatch

to the plaintiff under all the circumstances which appear to you to be reasonably material. The union was not required to furnish men if men were not available for employment by the plaintiff.

In determining whether or not the defendant union failed to perform its obligation to provide men to the plaintiff, you may consider such circumstances as the availability or non-availability of qualified men, the obligations of the union to supply and dispatch men to other employers, the type of men requested by the plaintiff, and any other fact which is in evidence and which you believe to be material in determining the reasonableness of the acts of the union. The union would not be liable for failing to supply men to the plaintiff if to do so was impossible under the circumstances which existed at [1325] the time the plaintiff made his request for men.

The defendant union was under no obligation to the plaintiff to attempt to persuade its members to leave any other job or employment in order to dispatch such men to the plaintiff.

Plaintiff's second cause of action based on a charge of conspiracy to restrain trade was, as I have told you, dismissed by the Court on legal grounds. This is not to be taken by you as any indication whatsoever as to whether or not the plaintiff should or should not recover on his second cause of action for breach of contract. Moreover, you are to consider and take into account only the evidence that bears upon or pertains to the issues raised by the first cause of action. That applies both to oral testi-

mony and documentary evidence introduced as exhibits. Putting it another way, you are to disregard entirely any and all evidence that bears upon or pertains only to the second cause of action.

Since the contract of the defendant with the plaintiff specified no time for performance, the time for performance would be a reasonable time. In determining what was a reasonable time, you should take into consideration the circumstances and all surrounding facts known to the defendant union at the time.

If you find that the general contractor, Lewis [1326] Hopkins, cancelled his contract with the plaintiff without affording the plaintiff and the union reasonable time in which to obtain and dispatch men to the plaintiff's job, and that in consequence plaintiff's damage resulted solely from the wrongful or unreasonable acts of Hopkins, then your verdict in this case should be for the defendant.

The union was not required under its agreement with the plaintiff to dispatch men to the plaintiff who were unwilling to work for the plaintiff, nor was the union required to insist that men dispatched to the job remain on the job if those men, of their own volition and without influence by the union, desired to quit.

The plaintiff in this case was required to take all reasonable steps to minimize the amount of his damage, and you may not include in your verdict any loss by plaintiff if by reasonable steps he could have avoided it.

Now, ladies and gentlemen, you are the sole and

exclusive judges of the evidence and the credibility of witnesses in this case and the weight to be attached to the testimony of each witness. In weighing the testimony of a witness, you should consider his demeanor upon the witness stand, his apparent fairness or lack of fairness, apparent candor or lack of that quality, [1327] reasonableness or unreasonableness of the story the witness relates, and the interest, if any, you may believe a witness feels in the result of the trial or in your verdict, and any facts or circumstances arising from the evidence which appeals to your judgment as in any wise affecting the credibility of the witness.

You should be slow to believe that any witness has testified falsely in this case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely except insofar as it may be corroborated by other credible evidence in the case.

Plaintiff having testified as a witness, the foregoing relating to credibility of witnesses, weight of testimony, applies to him and his testimony as well as to all other witnesses in the case. Likewise, the foregoing instruction as to credibility of witnesses and weight of their testimony applies to the testimony of the officers and agents of the defendant union when they testify in the case.

Testimony taken by deposition received in evidence before you is entitled to the same consideration that you would accord the same testimony if given from the witness stand by a witness in court. [1328]

Under the law, a labor union is responsible for its acts and consequences thereof to the same degree that an individual would be responsible.

Now, ladies and gentlemen, I have no means of knowing what your verdict will be and I certainly have no intention of suggesting to you or trying to influence you or to void your functions. I am going to leave that strictly to you. However, if you should return a verdict for the plaintiff, then it would be your duty to assess the amount of damages which are to be awarded to him. It therefore becomes necessary for me to instruct you on measure of damages. I want you to understand that my so instructing you is not to be taken by you as any indication as to what your verdict should be, whether it should be for the plaintiff or for the defendant. I am merely giving you this instruction on damages in the event that you should, from the evidence, conclude that the plaintiff was entitled to recover and would have use for it.

In accordance with the general principles governing the allowance of damages, a party to a contract who is injured by its breach is entitled to compensation for the injuries sustained and is entitled to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been [1329] performed. The measure of damages for the breach of the agreement between the defendant union and the plaintiff is the amount which would have been received if the contract had been kept, which means the value of the contract, in-

cluding the profits and advantages which are its direct results and fruits. A recovery may be had both for gains prevented and losses sustained by reason of the breach, including the loss of prospective profits and the plaintiff's loss of time while engaged in the performance of the contract.

It is not necessary that you determine the amount of the damages to the exact dollar and cents figure, a reasonable estimate is sufficient, but the amount should be based on the evidence and not on speculation or conjecture on your part.

In an action for damages for breach of contract, the fundamental principle is full compensation for the wrong done. The general rule is that compensation shall be equal to the injury. The breach is the measure by which the compensation is to be measured, and all that the law requires is that such damages be allowed as in the judgment of fair men and women directly and naturally resulted from the breach.

Now, if your verdict should be for the plaintiff, you may not properly include in the amount awarded [1330] supposed or claimed profits which the plaintiff might have received from contracts other than the Hopkins contract. Profits of the latter nature would be wholly speculative and/or conjecture and not supported by the evidence in the case.

Again, now, in case your verdict should be for the plaintiff, you are not permitted to add together different amounts representing the respective views of different jurors and divide the total

by 12. That is what is known as a quotient verdict and would be contrary to law.

You are, of course, to give consideration to each others' views and reasoning and honestly endeavor to reach a verdict, but such common agreement is to be based upon the final, honest belief of the jurors and must not be arrived at by that mechanical process of addition and division which constitutes a quotient verdict.

Now I want to say just a word about your deliberations. By the way, your verdict must be unanimous. All 12 of you must agree upon the verdict before the foreman can sign it and it can be received in court.

As men and women of practical affairs, it would be a very unusual miracle if 12 people could walk out in the jury room and all agree in a case of this kind on [1331] all the issues that are presented. That is not according to human affairs and human nature. Necessarily, if you are going to reach a verdict, there must be some give and take. You must deliberate together, you must have respect for each others' views, and I want, of course, to make it clear to you that if you have a firm, settled conviction, you shouldn't surrender it merely for the purpose of arriving at a verdict, but you should pay respect to the other fellow's views, and particularly if you find yourself very heavily in the minority, I think the thing a reasonable person should do is to re-examine his own views and his own position and wonder if the majority might not be right and he might be wrong, but don't sur-

render a conviction that you have merely for the sake of agreeing.

When you retire to the jury room to consider your verdict, you will take with you the exhibits which have been admitted in evidence in the case and forms of verdict which have been prepared for your convenience. They are very simple in this case. I don't think you will have any difficulty with them. They have a heading or what lawyers and judges call the caption of the case at the top, that is, W. C. Dillion against the Union, and then there is one for the plaintiff and one for the defendant and you select the one, of course, that [1332] corresponds to your conclusion which you have reached. This one for the plaintiff would be: "We, the jury in the above-entitled case, find for the plaintiff in the sum of blank dollars on the first cause of action." The one for the defendant reads: "We, the jury in the above-entitled cause, find for the defendant on the first cause of action." Simply select the one that fits your finding, and the first thing, as I have indicated, you should select a foreman, select one of your members as foreman, and the foreman acts as your chairman and presides over your deliberations, and then when you have agreed upon a verdict, signs it. And, as I have said before, all 12 of you have to agree to reach a verdict.

Now I will ask the jury to step out for a few minutes and then we will send you out to lunch.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: In the absence of the jury, counsel may now state their exceptions to the Court's instructions of failure to give instructions. If you wish to take my set, you are welcome to have them here.

Go ahead, if you are ready. I was just going to ask Mr. Vance if he was ready. Whoever is ready may state them.

Mr. Gladstone: Well, I was going to ask if it [1333] would be possible to take these up after lunch?

Mr. Vance: The defendant has no exceptions other than the failure to give a directed verdict for the defendant.

The Court: I see. I think you have restated your motion at the close of all the evidence.

Mr. Vance: Yes, I did.

The Court: Of course, you have the privilege of renewing it within ten days, as I understand it, under the rule.

Mr. Vance: That is what I understand. [1334]

* * *

January 18, 1957, 2 P.M.

(Whereupon, the trial in the instant cause was resumed pursuant to recess, all parties being present as before, and the following proceedings were had in the absence of the jury:)

Mr. Day: If I may hand the Court back its instructions.

The Court: Yes, all right.

EXCEPTIONS TO INSTRUCTIONS

Mr. Day: Your Honor, I at this time wish to take exception to the Court's instructions, particularly as to Instruction No. 4, which in the first paragraph provides or makes reference to transactions in interstate commerce and indicates that the plaintiff must prove by a preponderance of evidence that the plaintiff must establish the interstate commerce feature.

It is the plaintiff's position that this is a matter of law affecting jurisdiction and the Court's jurisdiction over this case, and that with the evidence before it the Court should determine as a matter of law that the jurisdiction has been established and either to instruct the jury or withhold instructions on interstate commerce from the instructions. And I admit that we have not furnished a proposed instruction instructing [1339] the jury as a matter of law, but it is our position that it would not be necessary, that the Court need not submit an instruction for a finding of fact on this matter.

The same applies, your Honor, to Instruction No. 5, which follows this Instruction No. 4, in that it again leaves a question of fact on interstate commerce for the determination of the jury, and I might also note that there has been no contradiction, at least in my recollection, of the interstate commerce feature.

The Court: I might point out, Mr. Day, that these instructions will not be filed. As a matter of fact, of course, they are not complete, and the only

way they will appear in the record will be in the reporter's transcript that he takes when I read them to the jury, so they will not appear by number, they will just run along in the continuous flow, if I might put it that way, without any numbers appearing in them or without any separation.

So I just want to call that to your attention, that I think you have so far, but you should identify them by reference to contents so that there won't be any doubt about what you are referring to in taking exceptions.

Mr. Day: All right. Well, our objection [1340] runs mainly in Instructions 4 and 5.

The Court: You described it, the interstate commerce issue?

Mr. Day: To the interstate commerce aspect.

With regard to the Court's instruction taken from the defendant union's proposed instruction relating to a reasonable interpretation of the collective bargaining agreement in issue here, we take exception to portions of Paragraph 2 of such instruction, which reads as follows:

"The union was not required to furnish men if men were not available for employment by the plaintiff. In determining whether or not the defendant union failed to perform its obligation to provide men to the plaintiff, you may consider such circumstances as the availability or non-availability of qualified men."

We object to this portion or all of Paragraphs 2 and 3 because of the fact that the impossibility of performance, the non-availability of men, relate to

affirmative defenses which have not been pleaded, are not implied, in my estimation, by a general denial or a specific denial of our pleadings, and there has been no request to amend or conform to the proof, if, in fact [1341] any proof was established.

We take exception——

The Court: I wonder about that. I didn't think your position was that the contract imposed an absolute liability on the union to furnish men and that there could be no excuse or circumstances that would relieve them. You didn't submit any instruction asking me to instruct the jury to that effect.

Mr. Day: We did not, your Honor, because we feel that the contract and the proof put in by us does not require or imply any defenses, and there has been no affirmative defense established and we don't think that it is——

The Court: Well, I don't think it is an affirmative defense; it is my judgment it is a question of interpretation of the contract and the burden is on you to prove breach of the contract as it existed.

Of course, I don't want to argue about your theory, you have a right to make a record here, but it seems to me, in fairness to the Court, if you were taking a position that there was an absolute liability under the contract, that would be tantamount to almost instructing a verdict for the plaintiff, because there was a contract, they didn't furnish the men, and Dillion lost this contract by reason of it, so if the [1342] jury followed the Court's instructions, they would find for the plaintiff necessarily under that theory.

But you make your record.

Mr. Day: Our next exception is taken to a proposed instruction by the defendant which was given by the Court, which instruction is short and reads as follows:

“The defendant union was under no obligation to the plaintiff to attempt to persuade its members to leave any other job in order to dispatch such men to the plaintiff.”

Such an instruction unnecessarily calls the attention of the jury to items which are not either in evidence or in the pleadings or no facts whatsoever in the evidence. It is an undue emphasis on a particular set of circumstances which I think were adduced only as self-serving statements, not as any defense, and were actually brought into this case by reason of, I believe, counsel's for the employers opening argument.

I urge this serious, your Honor, for your consideration at this time, and I think that this is opening an avenue here which certainly isn't in the pleadings—I don't think it is. I think, if [1343] anything——

The Court: Well, I believe implicitly it is there. Let's use our common sense. Look at all these records you have here of the hundreds that were employed down there by Blaw-Knox and by Kaiser and your other people, and your documents show that here, why, they had hundreds of men, they had hundreds of men here, but the jury could very well infer, “Well, why didn't they supply them? They had a contract to do it, they could have pulled them

off one of the other jobs," and I don't think their contract would so obligate them and to say that that is not in this case is just not being realistic because it is here as big as a mountain. I know how a jury might look at this: "Well, certainly, they should have supplied men. They could have pulled them away from Kaiser, they could have pulled them away from Blaw-Knox."

Mr. Day: Just by way of emphasis here, your Honor. We have not taken this position—I don't think we have. We haven't meant to imply by our evidence and I don't think our evidence has implied that there was an obligation on the defendants to remove anyone from a job, and this is basically our thought, that there is no evidence on the matter.

The Court: You are now asking me to adopt the theory that they had an absolute obligation to furnish [1344] you the men. Where were they going to get them? Wouldn't they have to pull them off another job if they were employed under your theory?

Mr. Day: I think there is still a source of men available, your Honor, under our proof.

The Court: Under their proof, there isn't. They are not obliged to go to the jury on your theory; they have a right to go to the jury on a question of fact; and under their theory there wasn't sufficient men. So according to your theory, the only place they could get men was to take them off some other job, and I say they hadn't an absolute obligation to furnish them, but only to furnish them if they were available, and I think I should say, in fairness to

the defendant, that they didn't have to pull them off another job.

But that is just a difference of opinion.

Mr. Day: Our next——

The Court: The only reason that I comment on it is because you say you seriously urge it and are asking me to change the instructions.

Mr. Day: Yes, your Honor.

My next exception pertains to an instruction proposed by the defendants as follows:

“If you find that the general contractor, Lewis Hopkins, canceled his contract with [1345] the plaintiff without affording the plaintiff and the union reasonable time within which to obtain and dispatch men to the plaintiff's job, and that in consequence plaintiff's damages resulted solely from the wrongful or unreasonable acts of Hopkins, then your verdict in this case shall be for the defendants.”

Now, we take the position, your Honor, that this instruction relates to a defense in avoidance or an affirmative defense on which there is no pleading, no issue, or evidence other than the comments of the defendant employers' counsel in his opening argument, as far as I can recollect. Further, that I don't think that this could even be an affirmative defense or a matter of pleading unless Lewis Hopkins were a party to this action.

Our next exception is to what I believe your Honor has marked as Instruction No. 12, reading generally as follows:

The Court: Pardon me, I haven't numbered mine. It is one of the proposed numbers.

Mr. Day: Yes.

The Court: Probably Defendant's Proposed 12.

Mr. Day: Possibly that is it. I have made a [1346] little marking for your reference, your Honor.

The Court: You will find that these numbers are not consecutive in here. What numbers appear are the numbers of the proposals of plaintiff and defendant.

Mr. Day: The instruction reads as follows:

"The union was not required under its agreement with the plaintiff to dispatch men to the plaintiff who were unwilling to work for the plaintiff, nor was the union required to insist that the men dispatched to the job remain on the job if these men of their own volition and without influence by the union desired to quit."

We take the position that there is no evidence of men being unwilling to work for the plaintiff, that there is no evidence or requirement or inference that the union would be required to keep men on in Dillion's job, and that this would be an affirmative matter which has not been pleaded.

Thank you, your Honor. [1347]

* * *

(After argument by counsel on motion for new trial or, in the alternative, judgment notwithstanding the verdict, the following proceedings were had:)

The Court: Well, I think this case has been rather troublesome for all of us. It presents very unusual, difficult problems and I finally came to the conclusion that the conspiracy part hadn't been established and what the jury finally came out with was a verdict for breach of contract under the National Labor Relations Act.

This contract between the employer and employee, while it isn't free from doubt in my mind, I think I will [1349] adhere to the position I took when I submitted the case to the jury, that the Court does have jurisdiction here and that the contract was not illegal, under the law, on the part of the employer.

I am genuinely disturbed, however, at the amount of the verdict. I think I have to assume that the jury followed the Court's instructions and it was not unduly influenced by the evidence which was on the conspiracy angle and which the Court instructed them to disregard, and I think that on this breach of contract that the jury was not limited strictly to the loss of profit of plaintiff employer here by reason of loss of the contract; I think that there was here an element of loss of business and his being put out of business, which the jury could consider, but this matter of the labor contract franchise, I don't believe that there was anything of that sort in the evidence here of a dollar and cents nature that the jury could use as a basis of award of damages.

It is a difficult problem. I don't ordinarily interfere with jury's amounts, particularly in personal

injury cases where I wouldn't have awarded that much or that little. I think that I should allow rather broad leeway to juries. We have the jury system and we have to work with it, but I really do think that this verdict is too high, and my reduction of it, of course, all I can do is make it [1350] provisional, but it necessarily has to be more or less arbitrary. I don't take quite the view that Mr. Vance does, nor do I think that the verdict in its full mount is justified, and, as I say, more or less arbitrary determination, I am going to direct that the verdict be reduced to \$30,000, or, in the alternative, if the plaintiff does not see fit to accept that reduction, that a new trial be granted.

Is there anything else?

(Which is all the proceedings had and evidence adduced in the above-entitled cause.)

[Endorsed]: Filed September 26, 1957. [1351]

[Title of Court of Appeals and Cause.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above

cause, called for in Appellant's Designation filed September 24, 1957,

Date of Filing	Title of Document
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4-29-55	Amended Complaint.
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5-11-55	Motion of Plumbers Union to Dismiss Amended Complaint.
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11-17-55	Order Denying Motion of Union to Dismiss Amended Complaint.
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12-19-55	Answer of Head, Mokler, Randolph and Taylor.
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12-19-55	Answer of Union, et al., and Affirmative Defense.
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1- 9-56	Reply to Union's Answer.
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1-17-57	Jury's Directed Verdict, Second Cause of Action.
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1-18-57	Jury's Verdict, First Cause of Action.
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1-17-57	Judgment on Jury's Verdict, Second Cause of Action.
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1-25-57	Alternate Motion for Judgment NOV and Motion for New Trial.
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2- 1-57	Judgment on Jury's Verdict, First Cause of Action.
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6-12-57	Order Denying Motion for Judgment NOV and Motion for New Trial.
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6-13-57	Plaintiff's Consent to Remittitur.
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7- 5-57	Notice of Appeal.
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7- 5-57	Stipulation re Supersedeas Bond on Appeal.
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7- 8-57	Order approving stipulation re Supersedeas Bond.
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7-24-57	Order extending time to file and Docket Record on Appeal to October 1.
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- 9-24-57—Reporter's Transcript of Proceedings.
9-24-57—Defendant Union's Abstract of Testimony Exhibits.
9-24-57—Statement of Points.
9-24-57—Designation of contents of Record on Appeal.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said District this 24th day of September, 1957.

[Seal] STANLEY D. TAYLOR,
Clerk, United States District Court, Eastern District of Washington.

By /s/ THOMAS GRANGER,
Deputy Clerk.

[Endorsed]: No. 15729. United States Court of Appeals for the Ninth Circuit. Plumbers & Steamfitters Union, Local No. 598, Appellant, vs. W. C. Dillion, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed: September 26, 1957.

Docketed: Sept. 28, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15729

PLUMBERS' UNION LOCAL 598 of PASCO,

Appellant,

vs.

W. C. DILLION,

Appellee.

STATEMENT OF POINTS

The Appellant Plumbers Local Union 598 of Pasco intends to rely on the following points on appeal.

1. That the evidence fails to show the existence of interstate commerce to establish the jurisdiction of the District Court within the meaning of the Labor Management Relations Act of 1947 and that otherwise the District Court was without jurisdiction.

2. That the contract on which the plaintiff relies was illegal and void and therefore no action will lie for its breach.

3. That the District Court erred in failing to grant the judgment notwithstanding the verdict of the jury for the above two reasons.

4. That the District Court erred in refusing to grant the defendant a new trial on the ground that the verdict of the jury was so grossly excessive as to be not supported by any evidence.

5. That the court erred in denying a motion for a new trial on condition of a remittitur of only the sum of \$10,000.00.

/s/ J DEANE VANCE,

VANCE & PETERSON,

Attorneys for the Appellant, Plumbers Union Local
598 of Pasco.

[Endorsed]: Filed September 28, 1957.

United States Court of Appeals
For the Ninth Circuit

PLUMBERS & STEAMFITTERS UNION, LOCAL NO. 598,
Appellant,

vs.

W. C. DILLION, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

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APR 14 1958

No. 15729

United States Court of Appeals
For the Ninth Circuit

PLUMBERS & STEAMFITTERS UNION, LOCAL NO. 598,
Appellant,
vs.
W. C. DILLION, *Appellee.*

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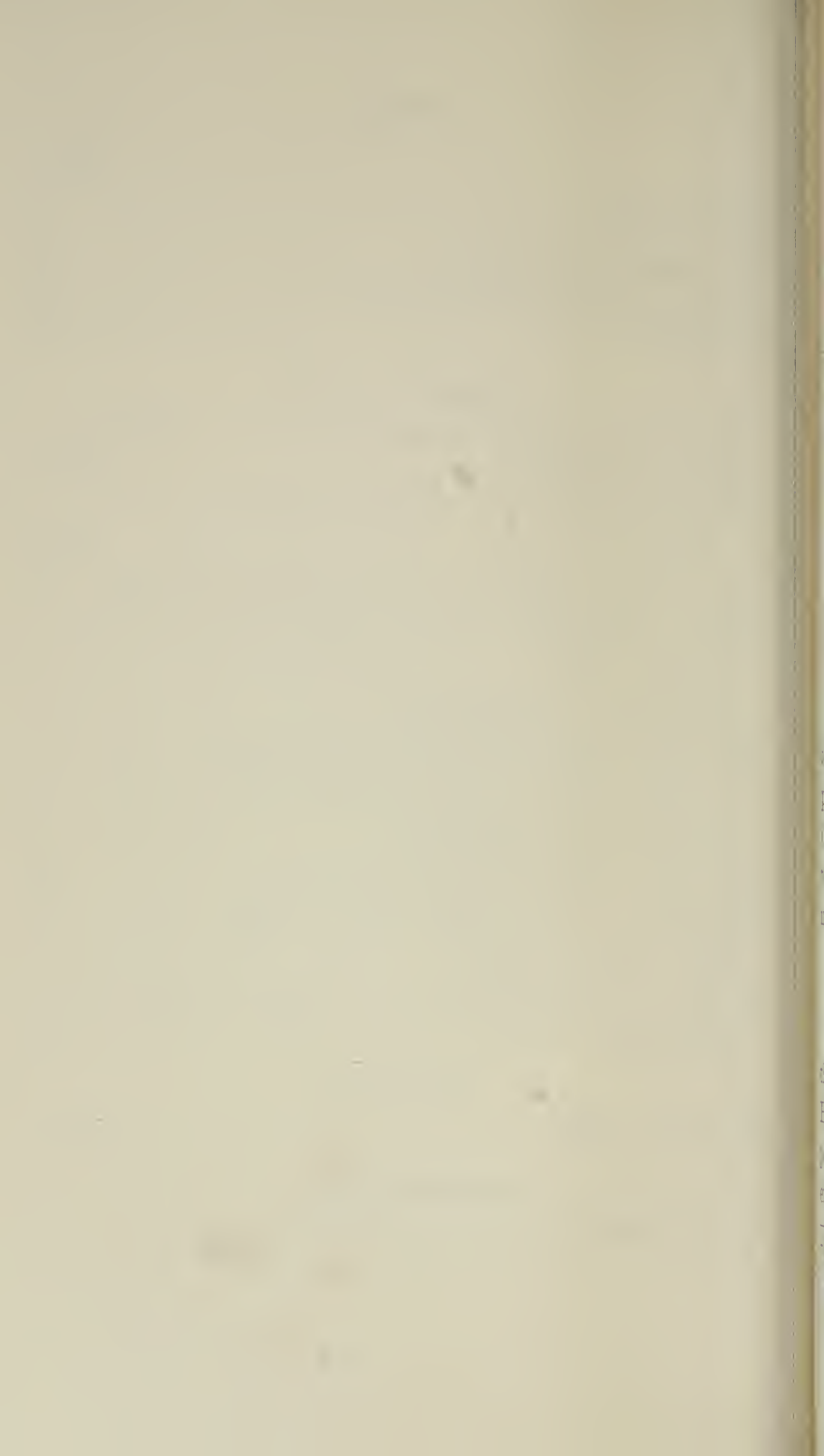
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United States Court of Appeals

For the Ninth Circuit

PLUMBERS & STEAMFITTERS UNION, LOCAL No. 598,		<i>Appellant</i> ,	} No. 15729
	vs.		
W. C. DILLION,		<i>Appellee</i> .	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

INTRODUCTION

Appellee, in his answering brief, as did appellant in its opening brief, divides his argument into three points, (A) Commerce, (B) Legality of the Contract, (C) Excessiveness of the Award. In this brief, we reply to appellee's brief in like order without intending to indicate in any way the order of importance.

A. COMMERCE

One of the positions now taken by appellee is that there is jurisdiction under Section 301 of the Taft-Hartley Act* (29 USCA Section 185) because the appellant Union represents employees who work for other employers in the plumbing or pipefitting business who

*Properly known as The Labor-Management Relations Act of 1947, sometimes herein referred to simply as the Act.

are engaged in commerce within the meaning of the Act. This reasoning is based upon a shallow reading of the words of Section 301 wherein it is stated "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act * * * may be brought in any district court * * * " (Subsection (a)). Appellee's argument then is: "The plumbing industry is a branch of the building trades and there is now no question but what the building trades affect interstate commerce" (Appellee's brief, page 3). Appellee emphasizes the point at page 4 by stating that the appellant has ignored "the fact that the union is a labor organization representing employees in an industry affecting commerce."

In this respect appellee's argument is in effect that since some employers of the plumbing industry affect commerce, the industry "affects commerce" within the meaning of Section 301 and therefore any union representing employees of any plumber anywhere in the United States may sue or be sued in the Federal district courts without diversity or requisite amount for breach of a collective bargaining agreement. Of course, today all "industries," if thus construed, affect commerce. For example, the pharmaceutical industry affects commerce. Under appellee's interpretation then, any union representing any clerical employee of any corner drug store would be a union "representing employees in an industry affecting commerce." Such examples could be multiplied *ad nauseum*.

Such an interpretation, of course, would at least as

to actions for breach of contract, effectually obliterate any distinction between national and local enterprises, as this court and the United States Supreme Court have held cannot be done. *N. L. R. B. v. Jones and Laughlin Steel Corporation*, 301 U.S. 1, 81 L.Ed. 893. *Fairway Foods, Inc., v. Fairway Markets, Inc.*, 227 F.2d 193.

This is particularly true since that which the Taft-Hartley Act regulates it pre-empts. *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 1 L.Ed.2d 601. *Garner v. Teamsters*, 346 U.S. 485, 98 L.Ed. 228. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 99 L.Ed. 546. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L.Ed.2d 972, the Supreme Court held that Section 301 established a body of federal law to be applied by the courts. Thus to follow appellee's reasoning is to reach the inescapable conclusion that all actions for breach of contract between any union and any employer, whether the employer involved is engaged in or substantially affects interstate commerce or not must be brought in or be removable to the federal court and governed by federal law. The obliteration referred to could not be more complete.

Such an interpretation of the statute is unthinkable and unnecessary. The application of a few common rules of statutory interpretation dictate a different conclusion. In the first place, such an interpretation would pose a constitutional question: to-wit, does Congress have the power to regulate the labor relations of a given employer and a given union, in the exercise of its commerce power, simply because the union concerned represents employees of other employers in the

same or a related business who are engaged in commerce. This involves not only the measure of the Congressional power in the regulation of commerce itself, but the constitutional limits imposed by Article III of the United States Constitution relating to the jurisdiction of federal courts. That interpretation of a statute which avoids the necessity of involving a constitutional question is to be adopted. *Association v. Westinghouse Electric Co.*, 348 U.S. 437, 99 L.Ed. 510. *Guessefeldt v. McGrath*, 342 U.S. 308, 96 L.Ed. 342. Therefore, a construction which is clearly constitutional, to-wit: Congress intended to regulate collective bargaining contracts where the employer concerned or the work to be performed thereunder involve or affect interstate commerce, is to be preferred over a construction which involves a constitutional question of the power of Congress, to-wit: Congress intended to regulate any collective bargaining agreement between any employer and any union regardless of commerce of the employer concerned or the commerce of the work to be performed under the contract if the union concerned represented some employees of any employer or employers engaged in commerce.

Likewise, it is axiomatic that all parts of an act are to be given effect if possible and are to be construed together. From the declaration of policy of the Act it is clear that the act was intended to apply only to those disputes and affairs affecting commerce. In Section 1(b) of the Act, which is the "Title and Declaration of Policy" it is said in part:

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe

the legitimate rights of both employees and employers in *their relations affecting commerce*. * * * and to protect the rights of the public *in connection with labor disputes affecting commerce*." (Emphasis supplied)

Like declarations are to be found in Section 101.

Therefore it seems abundantly clear that Congress intended in Section 301 to confer jurisdiction upon the district courts to entertain suits for violation of contract only where the employer involved, if not, indeed, the business in the individual contract, concerned the performance of work in or substantially affecting commerce.

Counsel for appellee, with some obvious glee, adopt appellant's assertion that the instructions as to commerce became the law of the case for want of objection by either party (Appellee's brief, page 2). If appellee now adheres to that position he is foreclosed from relying on the commerce of any person other than himself for the court's instruction was: "The plaintiff has the burden of proving by a preponderance of the evidence, (1) that the plaintiff was engaged in business and that this business included transactions in interstate commerce or transactions which materially affected interstate commerce" (Tr. 201). But appellee does not point out in his brief any proof of commerce of appellee's business on which a verdict could be based nor does that position seem to be argued.

Appellee's efforts to latch on to the commerce of the general contractor's business is likewise futile and for the same reasons. While it is established that the gen-

eral contractor himself sometimes engaged in interstate commerce, there was no proof that the enterprise here engaged in by the general contractor involved any interstate commerce. The use of the commerce of another as in the *Reed* case (*N. L. R. B. v. Reed* (9 Cir.) 206 F.2d 184) is based upon the situation where, in the language of this court, the “activities are a part of a single enterprise” which single enterprise would involve commerce.

Two other minor points mentioned by counsel for appellee in their brief on this point are notable only in passing.

(1) Counsel mentions the practice of the NLRB in the projection of short term business volume to cover a year's period (Appellee's brief, page 8). This is done by the Board for the purpose of applying the Board's discretionary yardsticks based upon a year's business and has no place in determining the jurisdictional minimums for the application of the Federal Act.

(2) Counsel mentions national defense (Appellee's brief, page 8). The Board has lowered its discretionary standard in cases where national defense is involved, but since the Act is based upon the commerce clause and not the war powers of Congress, jurisdiction is not sustainable where there is no commerce simply because the work is on a defense project. See *e.g.*, *N. L. R. B. v. Stoller* (9 Cir.) 207 F.2d 305.

B. LEGALITY OF CONTRACT

Appellant welcomes the argument made by appellee at pages 12 to 18 of his brief that the contract here was

“legal.” This appellant and its affiliated unions would gladly pay the judgment in this case in full if that came as a result of an authoritative ruling that the closed shop contract which it had carried over from pre-Taft-Hartley days maintained even a shadow of legality. Such contracts were, of course, not invalid prior to Taft-Hartley. They had been utilized for some eighty years by the building trades unions and were not lightly eliminated by virtue of the Taft-Hartley revisions. As a result, this appellant and its sister building trades unions have, through a course of litigation all too familiar to this court, been required to pay the penalties imposed for their illegality and their continued existence after the Taft-Hartey Act. The distinctions argued for by appellee are too tenuous to save the contract.

Naturally, the contract applies only to the employees in the bargaining unit to which it applies. Such is true of all collective bargaining agreements and the closed shop provisions are not rendered legal by virtue of the fact that some employees outside the bargaining unit may not be included within its terms or excluded from its discriminatory reach. Such argument avails nothing.

We agree with appellee that, at least as of the date of this brief, the reported decisions do not render illegal contracts requiring employment of personnel through the hiring hall of a union but in the same sentence and breath this contract requires the employer to “retain in its employ only members in continuous good standing in the unions” and furthermore to discharge forth-

with employees not in good standing in the union. There is no thirty-day waiting period and no "escape" period. The mere execution of such a contract is illegal. *N. L. R. B. v. Gottfried Packing Company, Inc.* (C.A. 2, 1954) 210 F.2d 772, 33 LRRM 2550, and see *N.L.R.B. v. Carpenters Union* (C.A. 9, 1953) 202 F.2d 516, 31 LRRM 2450.

Appellee simply fails to distinguish between a "closed shop" contract and one which merely requires the employer to obtain his employees through the Union hiring hall. In the latter case only is the discriminatory or non-discriminatory operation of the hall relevant.

The appellee, in addressing himself to the question of severability of the illegal contractual provision, relies upon the statement of the author of an annotation as to what the "majority" of cases hold without specifying any of the cases constituting the so-called "majority" he relies on. Even the numerical certification of the author of the article is in itself in some doubt because he fails to note the existence of the cases cited to the point in appellants' brief. The Article is relatively old, 1950, and some of these cases were decided after the article was written.

Even though illegality of the union security clause in a contract may be severable, and thus not fatal to an action based upon a breach of the wage and hour clauses of the contract such a holding would not be dispositive of this case where the breach is in the hiring process itself, concerning which subject the union security clause is directly involved. The ordinary union contract, *sans* closed shop, imports no obligation to furnish

employees. In *Association v. Westinghouse Electric Company*, 348 U.S. 439, 99 L.Ed. 510, at page 527, in a concurring opinion Justice Reed said, "The union does not undertake to do work for the employer or even to furnish workers." Where, however, as here, there is a closed shop contract requiring an employer to obtain his employees from a union, then undoubtedly there is a concomitant duty on the part of the union to furnish such employees. The court instructed the jury, without exception by appellant, that "The collective bargaining agreement in this case does impose an obligation upon the defendant union to supply and dispatch men to the plaintiff" (Tr. 203). We felt at the time of trial and feel now, that if the union required the employer to obtain his men from the union, the *quid pro quo* of that provision and that provision alone was an implied obligation to furnish men. Since the obligation does not exist, as pointed out by Justice Reed, in the absence of such a union security provision it must inhere in that provision. Thus the plaintiff's cause of action rests upon a claimed violation of an implied obligation growing out of the very section of the contract which is illegal and the question of severability should, therefore, be academic.

C. DAMAGES

Appellee here relies in large part upon a colloquy with the trial court. Counsel, in that conference, asked the court a number of questions about what counsel would be permitted to argue to the jury, including such things as whether he, counsel, could argue attorney's fees to the jury (Tr. 185). The trial court attempted to

assist counsel, perhaps improvidently. Now counsel argues that the appellant is bound by this colloquy, the same as it would be bound by the court's instructions if it failed to object thereto (Appellee's brief, page 231). The appellant was, of course, not required to, and would not have been permitted to, quarrel with the trial court because it disagreed with anything he said during colloquy. If such were the case, the bickering during the course of litigation would be endless. It suffices here to say that in those comments of the court to which appellant had the right and the duty to state its exceptions for the record, that is to say, the instructions given to the jury, no reference was made to any general item of damages other than that the plaintiff was to be allowed the actual damages by him sustained; to be placed as nearly as possible in the position he would have been had the contract been performed, but without any allowance for loss of future profits. In order to sustain this verdict, counsel is in effect arguing that the jury took into consideration an item for loss of business, which clearly under the authorities cited in appellant's opening brief he would not be entitled to, and which, if given to the jury as an allowable item by the instructions of the trial court, would have been error. This would put the appellant in the awkward and untenable position of accepting an illegal measure of damages by reason of failure to except to instructions which were, in fact, not given. Such a position cannot be supported by resort to counsel's failure to quibble with the trial court during a colloquy in chambers.

Appellee seeks to distinguish the *Ford Motor Com-*

pany case (*Ford Motor Company v. Mahone*, 205 F.2d 267) on the grounds that in that case there were specific facts and circumstances that occurred during the trial that gave rise to an excessive verdict (appellee's brief, page 29). Rather than being a difference, that precise similarity was the reason for the citation of that case in appellant's opening brief. While the facts and circumstances of pity and sympathy and/or prejudice are different, such do exist in both cases. In this case, the plaintiff's original action was principally one for conspiracy between the defendant union and several employers for violation of the anti-trust laws. Counsel said in his opening statement that they were putting the greater emphasis on the conspiracy cause of action (Tr. 150). The evidence, as is the case in conspiracy actions, covered a large field and many statements were rendered admissible by reason of the presence of additional defendants and the allegations of conspiracy that would otherwise have been inadmissible. At the time of the dismissal of the conspiracy action and the employer defendants appellant's counsel adverted to this situation and then observed his inability to segregate in a practicable manner, the admissible from the inadmissible at that stage of the trial, a statement with which the trial court concurred (See Tr. 181-182). The net result was that the jury heard a great amount of highly prejudicial and inflammatory evidence directed to a cause of action and defendants which were dismissed by the trial court. Under such circumstances, and in view of the rendering of the verdict in an amount at least four times in excess of any computable loss, the only appropriate remedy is a new trial.

CONCLUSION

Appellant renews the conclusion stated in its opening brief.

Respectfully submitted,

J. DUANE VANCE

Attorney for Appellant.

No. 15729

United States Court of Appeals
For the Ninth Circuit

PLUMBERS & STEAMFITTERS UNION, LOCAL No. 598,
Appellant,
vs.
W. C. DILLION, *Appellee.*

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FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLEE

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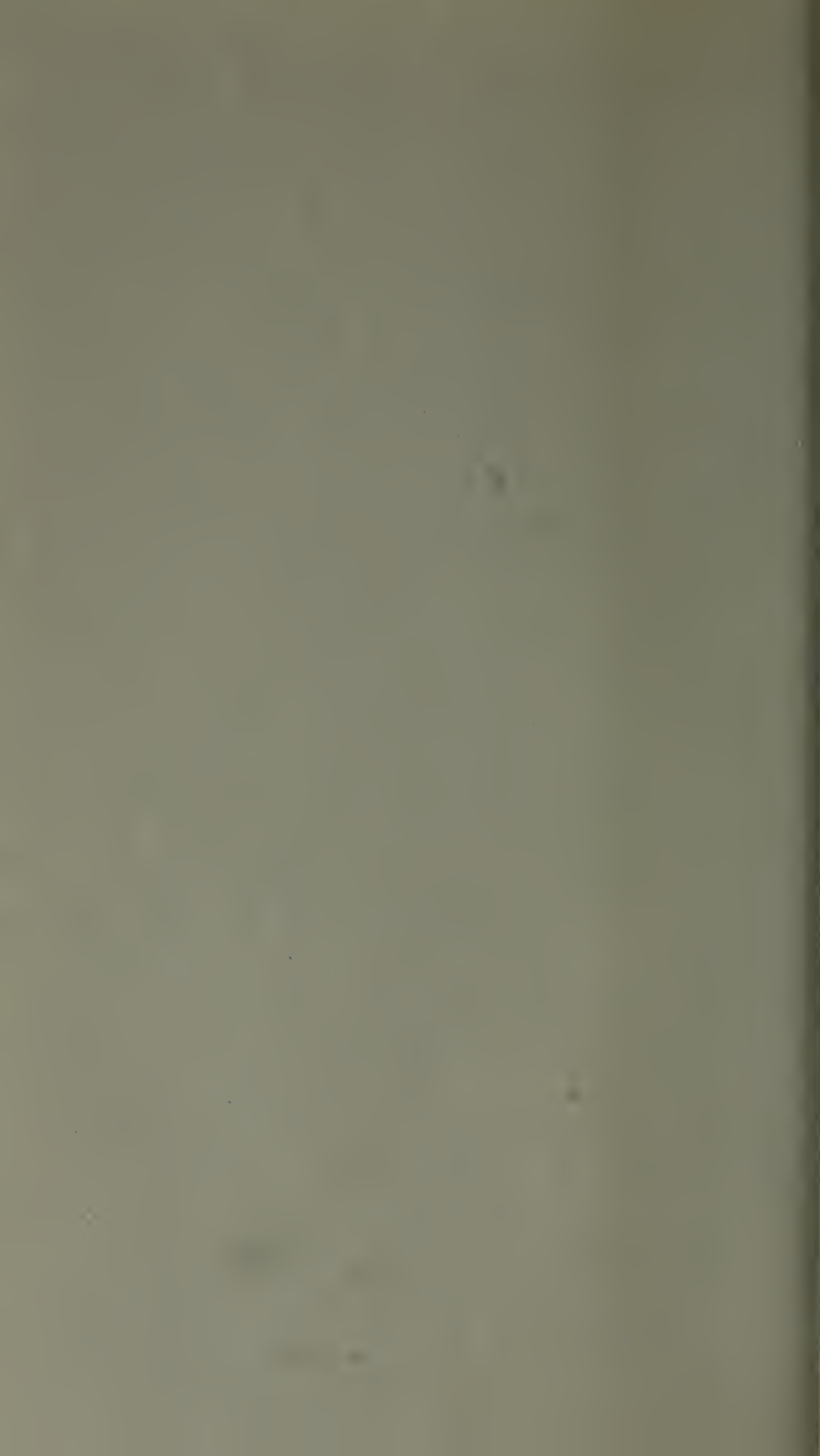
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No. 15729

United States Court of Appeals
For the Ninth Circuit

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BRIEF OF APPELLEE

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United States Court of Appeals
For the Ninth Circuit

PLUMBERS & STEAMFITTERS UNION
LOCAL NO. 598,

Appellant,

vs.

No. 15729

W. C. DILLION,

Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLEE

A. STATEMENT OF CASE

Appellant's statement of the case is controverted in that it states that Thorn and Marble did exactly the same work that Dillion (Appellee) would have done under his contract with Lewis Hopkins d/b/a Lewis Hopkins Company (Brief of Appellant p. 7), however, the Jury could well have found that the facts were that Appellee was to handle all the pipe from the time that it was placed on the railroad siding (Tr. 75 & 101) until it was placed in the river whereas Thorn and Marble did not handle, lay or place any pipe (Tr. 124), and the Jury could have found that Appellee would have cleared \$6,000.00 on that contract (Tr. 93).

B. ARGUMENT

I.

Jurisdiction of the District Court Was Established By the Evidence

The matter of whether or not interstate commerce was involved was submitted to the Jury as a question of fact to be determined by the Jury under the Court's instructions (Tr. 201 & 203). These instructions became the law of the case since they were not excepted to by either party just the same as the instructions to the damages became the law of the case as Appellant has admitted (Appellant's Brief p. 23). Appellant now is seeking to establish error in the findings of the Jury by urging refinements of the law that should have been appropriately submitted as requested instructions to the Jury. *Persons v. Gerlinger Carrier Co.*, 227 F. 2d 337, *Mitchell v. U. S.*, 213 F. 2d 951, cert. denied, 75 S. Ct. 290, 34 U. S. 912, 99 L. Ed. 715, *Ziegler v. U. S.*, 174 F. 2d 439, Cert. denied 70 S. Ct. 68, 338 U. S. 882, 94 L. Ed. 499.

Under Sec 301, Title III of the *Taft Hartley Act* (29 USC 185) Appellee could establish jurisdiction in the District Court by showing that he had a contract with a (1) Labor Organization (2) representing employees in an industry affecting commerce.

“From the face of the act (the Taft-Hartley Act Title III, Sec. 301, 61, Stat. 156, 29 USCA 185) it is apparent that Sec. 301 (a) and 301 (b) supplement one another. Section 301 (b) makes it possible for a labor organization, representing employees in an industry affecting commerce, to sue and be sued as an entity in the federal courts. Section 301 (b) certainly does something more than that. Plainly, it supplies the basis upon which the federal district courts may take jurisdiction and apply the procedural rule of Section 301 (b) the question is whether Sec. 301 (a) is more than jurisdictional.”

Textile Workers Union v. Lincoln Mills of Alabama, 77 S. Ct. 912, 353 U. S. 448.

Of course, the Plumbing Industry is a branch of the building trades and there is now no question but what the building trades affect interstate commerce. *NLRB v. Denver Building & Construction Trades Council*, 341 US 675, 71 S. Ct. 943, 95 L. Ed. 1284; and, especially, *NLRB v. Reed*, (9th Cir.) 206 F. 2d 184; also, *Douglas v. International Brotherhood of Electrical Workers*, 136 F. Sup. 68, wherein the Reed case is cited. Furthermore, the defendant Union has obtained certification by the NLRB on the specific representation that it does represent employees in an industry affecting commerce which fact we are sure that Appellant will not now deny.

Jurisdiction in the District Court could be predicated upon either (1) the fact that the Union is a labor organization representing employees in an industry affecting commerce or (2) that the employer is engaged in industry affecting commerce. On this appeal Appellant has so far ignored the first basis of jurisdiction in his argument and seeks to establish that because the second basis for jurisdiction does not exist in its opinion that then there is no jurisdiction in the Court. Appellee submits that even looking at it as Appellant does, the law which he cites is not sufficient to support the proposition that he urges. Looking first to the case of *Fairway Foods, Inc. v. Fairway Markets, Inc.* (Appellant's Brief p. 14) it is to be noted that this is a case under the Lanham Trade Mark Act and the Court is considering whether or not there was interstate commerce involved under that Act and not under the National Labor Relations Act. Further, the point emphasized by Appellant by that case makes it plain that local activities may affect commerce if there is a showing that the local business is part of a coordinated interstate system substantially affecting commerce (See the quotation at p. 14 of Appellant's Brief), and whether or not Appellant's construction activities affect commerce will not be measured by the activities of a grocery concern such as those involved in the *Fairway Foods* case, (See *Labor Board v. Jones & Laughlin* 301 US 1, 57 S. Ct. 615 where the Court said:

“Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the Statute to be determined as individual cases arise.”)

However, testing Appellee’s activities according to the law applicable to the construction trades such as set forth in *NLRB v. Reed* (9th Cir.), 206 F. 2d 184, it would appear clear that his activities would affect commerce. This law referred to in the Reed case is as follows:

“***It has been established that, although the construction of a building is by its nature a local activity, the importation from another state of a substantial amount of the material used in it affects interstate commerce sufficiently to create jurisdiction in the Board. (p. 186)

“There is inherent difficulty in applying the National Labor Relations Act to the building and construction business. By way of comparison, we refer to the well known fact that manufacturing companies, over which the Board has exercised jurisdiction, have sufficient continuity and identity in their businesses to preclude the necessity of re-examination with each change of product, market, or source of raw materials,

while general constructing companies, by their very nature, lack these qualities in their job-to-job operations. Such lack of continuity is caused by the differences in size and requirements of each job and results in an unstable labor force both in the identity and quantity of the personnel employed. Then, too, a builder may purchase materials from out of the state in one job or do work for a company which is engaged in interstate commerce in another job; a third job may be done for a local enterprise with local materials. Nevertheless, when a builder so conducts his activities that his undertakings include both strictly local jobs and jobs affecting commerce, he is in no different position from that of a manufacturer who engages in both local and interstate activities. The employer in both instances is engaged in commerce. That part of the work force may be engaged solely on the local aspects does not deprive the over-all activities of an employer of their interstate character."

Also, it is to be noted that when the activities of Appellee are considered in their connection with the operations of the Lewis Hopkins Co. (Tr. 97-99) it would appear to fall clearly within the Rule stated at p. 188 of the Reed case where this Court said:

"***the Board has the legal power to take jurisdiction over a Company's labor problems when

the Company's activities are a part of a single enterprise undertaken by a Company which does 'substantially affect' interstate commerce in connection with the enterprise*****"

Looking at the *Groneman* case cited by Appellant at p. 15 of its Brief, it would appear that Mr. Groneman did not have a connection with a General Contractor such as Appellee had with the Lewis Hopkins Co. in that the Court said in the *Groneman* case:

"*****Groneman is operating a purely local business in no wise connected with anyone engaged in commerce,***"

Also, the Jury could have found that Appellee had many contracts in contemplation (Tr. 87, 88 & 89) while the Court found as to *Groneman*:

"Neither is there any evidence that he had other other contracts *or contracts in contemplation* that might be affected by the dispute." (emphasis supplied)

Appellant's Counsel indicates difficulty in understanding the Court's comment quoted at p. 15 of his Brief which is directed to the issue as to whether or not "interstate commerce" was involved by Appellee's activities as defined in the Sherman Act, whereas he had no difficulty understanding this during the course

of the trial as noted at p. 163 of the Tr. where the following colloquy between the Court and Counsel occurred:

“The Court: Yes. Of course, it is my understanding of it that interstate commerce has a much broader meaning and reach in the case of the National Labor Relations Board than it does in a case of the Sherman-Clayton Acts.

“Mr. Vance: No question about it.”

But on the question of the future intentions of one engaged in an industry, it is to be noted that when an employer's business is newly established and no annual figures are available, the Board customarily projects over a full year whatever figures on business volume are available. In various cases, the Board (the National Labor Relations Board) has asserted jurisdiction on the basis of projections of the business volume for a week, (*American Television, Inc. of Missouri*, 111 NLRB 164 (1955)), 20 weeks (*Carpenter Baking Co.*, 112 NLRB 288 (1955)), and 8 months (*Sarfit Lumber Co.*, 111 NLRB 657 (1955)) accord *Miller Container Corp.*, 115 NLRB 509 (1956); *Wildwood Lumber Co.*, 114 NLRB 186 (1955), (6 month figures projected). As to the use of predictions when no operating experience is available, the Board said in one case:

“If the Company had not had any operating experience its prediction of the volume of business it would do might have served to meet our jurisdictional standards.”

Local 140, *Bedding, Curtain & Drapery Workers Union* (Cenit Noll Sleep Products, Inc.) 115 NLRB 318 (1956). (In that case the Board rejected the predictions because they exceeded a projection of the company's actual sales experience during its first three months of operation, but this could not detract from the statement quoted).

Appellant's Counsel points out that the Court instructed the Jury that they could not consider loss of profits in assessing damages because to do so would be “wholly speculative and/or conjection” (p. 16 of Appellant's Brief) which only serves to emphasize the fact that the Court gave no such instruction as to the evidence applicable to the issue of interstate commerce and so it must be (and so appropriately stated by Appellant's Counsel after this point in his Brief) that “by failure to object (defendant's Counsel) acquiesced in this proposition.”

It is submitted that the comments of the Court in the case of *Shore v. Building & Construction Trades Council*, 173 F. 2d. 678, furnish appropriate guides for measuring Appellee's activities in determining

whether or not they affect commerce. The Court there said:

“***In this Act(the National Labor Relations Act) Congress has endeavored to exercise the commerce power given to it under the constitution, Article I, Section 8, Clause 3, so far as that power will reach. Not only are labor practices which occur during the actual conduct of interstate commerce regulated, but regulation is likewise extended to certain acts which may “affect” interstate commerce. In the past decade the Supreme Court has told us in a series of decisions applicable to various aspects of Federal Legislation, how wide the power under the commerce clause is. Artificial divisions previously established between such things as production, manufacturing and transportation has been swept away. And, as Mr. Justice Frankfurter pointed out in the *Polish National Alliance Case* (322 US 643, 64 S. Ct. 1196) what affects interstate commerce is a matter of practical judgment.

“***What affects the building industry in a given community affects interstate commerce and that the total effect of a 10 million dollar industry on interstate commerce is obviously very appreciable. One small stopage may not have an imme-

diately perceptible effect upon the flow of the whole stream, but many small stopages will have such effect."

Further, this Court has previously noted that the National Labor Relations Board has established criteria under which it exercises its jurisdiction in the construction field, See *NLRB v. Reed*, Supra, where the Court noted:

"The Board would exercise jurisdiction (over) ****any construction firm whose work affects national defense."

That the Hanford Atomic Projects Operation is a national defense project is without question as also is the fact that contract which Appellee had with the Lewis Hopkins Co. was a contract for construction of an outfall structure at the Hanford Project, a fortiori, there was jurisdiction in the instant case. *NLRB v. Stoller* (9th Cir.) 207 F. 2d 305.

Concluding, though Appellee has sought to meet the issue of jurisdiction by meeting the arguments and reasons advanced by Appellant for his claim that there is no jurisdiction, Appellee is not departing from his original premise that there is jurisdiction under the authority of *Textile Workers Union v. Lincoln Mills of Alabama*, Supra, and the argument hereto applied.

II.

**The Contract on Which the
Plaintiff Sued Was Legal**

Appellant's challenge to the legality of the contract on which Appellee sued (Exhibit 2) is directed to the legality of Section 3 thereof. Resolution of this issue requires first a careful analysis of the specific section which provides:

“The employers agree to hire all employees covered by this Agreement from and through the Unions and to retain in its employ only members in continuance good standing in the Unions.”

This is the first sentence of the first paragraph of Section 3. The appropriate rules of construction, which are Textbook Law, are that doubts in construction will be resolved against the maker of the contract, 12 Am. Jur. Contracts, Sec. 252, p. 795, and a contract will be construed with every fair intendment towards legality rather than illegality, 12 Am. Jur. Contracts, Sec. 251, p. 793. With these rules in mind then, we examine the first sentence quoted and we note that the employer's did not agree to hire simply “all!” employees from the Union but only “all employees covered by this Agreement” from the Union. Certainly it was contemplated by the parties to the agreement that the employers could have employees other than

Union members otherwise the words "covered by this agreement" would have no significance whatsoever, and since it was not exclusionary this part would not be illegal. The employer's agreement "to retain in (their) employ only members in continuing good standing in the Union" is modified by the second paragraph of Section 3 in that the second paragraph specifies generally the procedure by which non-union members are to be terminated in their employment in that it states:

"The employers agree to forthwith discharge any employee upon written notice from the Union that such employee is not in good standing in the Union."

Since 29 USCA Sec. 158, (a) (3) specifies that it would be:

"An unfair labor practice for an employer***to interfere with, restrain, or coerce employees**** by discrimination in regard to*****tenure of employment, provided that nothing in this subchapter****shall preclude an employer from making an agreement with the labor organization****to require as a condition of employment membership therein on or after the 30th day following the beginning of such employment or the effective date of such agreement, whichever is the later*****"

The question then becomes, does this last quoted paragraph of the Agreement require a discharge prior to the expiration of thirty days from the beginning employment or the effective date of the agreement? Having the two general rules of contract construction in mind as previously noted it is submitted that a proper construction of this provision would require a legal construction and this would mean that the discharge would take place only after the lapse of the requisite thirty day period. This might in a strict sense put into focus the meaning of the word "forthwith" as used in the second paragraph of Sec. 3, and the following definition is therefore appropriate:

"Forthwith. The term has been said to be an elastic one, with a relative meaning, depending in any case on the circumstances.

"In more technical applications* *within such time as to permit that which is to be done to be done lawfully." 37 C.J.S. 128.

In interpreting the NLRB section in question, the Courts have held that a hiring hall arrangement is not *per se* unlawful in the absence of evidence that the Union unlawfully discriminates in supplying employer with personnel. *Eichlay Corporation v. NLRB* 206 F. 2d 799 and *NLRB v. Radio, Etc. Union*, 347 U.S. 17, 74 S. Ct. 328. In this respect, it is appropriate to

note the case of *NLRB vs. N.M.U.* cited by Appellant at p. 17 of his brief, where the Court said:

“Most of the contentions made by respondents in this Court were considered and satisfactorily answered in the Board’s decision. There is no need to discuss the Board’s answers in detail. Suffice it to say that the Board did not hold violative of the Act mere hiring hall provisions of the Agreement which respondents demanded of the employers. In its decision, the Board said “***We do not pass upon whether or not the hiring hall provision would be unlawful absent evidence that in supplying the companies with personnel NMU discriminated against non-members. The record establishes, and we find, that in the operation of the hiring halls in question, such discrimination against non-members did exist ***. In disposing of this contention it is not necessary for us to determine whether an employer would violate Sec. 8 (a) (3) by the mere act of executing a contract containing the hiring hall clause, the performance of which we have found would, under the conditions here present, violate the provisions of the Act.***”

The same thing is true of the *NLRB v. Alaska Steamship Company* case cited at p. 17 of Appellant’s brief. Hence the Court noted in that case that the Board

found “***that, pursuant to the preferential hiring provisions of the agreement, Underwood was denied employment with the Company because he had resigned from membership in the Union.” Also, it should be noted as to this last cited that the Court did not review the Board’s determination of law, and pass on it, but it merely notes what the Board found.

Referring to the *Lewis v. Jackson and Squire case* cited by Appellant at p. 17 of its brief, Appellee would point out that the Court there first found that the agreement was to be construed under the laws of the State of Arkansas and that

“unquestionably, closed shop and union shop agreements are unlawful in Arkansas.”

so that the case is not authority for the proposition that the contract closed shop provision was invalid under the Natinal Labor Relations Act. The case is authority for the proposition that it is necessary to determine whether or not, if a provision is found to be invalid, it invalidates the whle contract. The Court there said:

“It is necessary to determine if this provision (a closed shop provision) is separable from the other parts of the agreement so that it may be discarded and the remainder enforced.”

Answering this, the Court said:

“Apparently the parties to the agreements intended that the union shop provision as well as all other provisions be essential, for the agreements themselves provide: ‘this agreement is an integrated instrument and its respective provisions are interdependent**’ Furthermore, it is apparent that the United Mine Workers of America would not have entered into the agreements had the union shop clause not been inserted. This is manifested by the fact that the union conducted a strike in support of its position that its agreements contain a union shop clause, and in a recent case for the NLRB, the Board found that the Union had violated Sec. 8 (b) (2) in the Labor Management Relations Act of 1947, by reason of conducting a strike in support of its contention that its agreements include a union shop provision.”

In our case, the agreement (Exhibit 2) did not contain a provision requiring that it be construed as an integrated instrument nor state that the provisions are interdependent.

As we have noted above, illegality depends on both an improper contractual provision as well as a showing of discrimination in furnishing employees under

the provision. It is well to note that the record in our case shows no such discrimination and the *Lewis v. Jackson and Squire case*, Supra, is authority for the proposition that the record would have to show the discrimination (See also *NLRB v. International Union of Operating Engineers, Local 12*, 237 F. 2d 670. (Ninth Circuit)) and the Court could not assume this fact from circumstances dehors the record. In this respect, the Court said:

“Furthermore, while the Court is advised, dehors the record, that the United Mine Workers of America have not complied with the Labor Management Relations Act, yet, the record before the Court does not contain any proof of such uncompliance, and therefore, the Court does not pass on this contention of the defendant.”

Appellant next cites certain cases which emphasize the proposition that if an illegal provision is found in a contract it does not invalidate the whole contract unless the “fabric of illegality” ran “through the entire contract.” *Local Union No. 420 v. Carrier Corporation* cited by Appellant at p. 18 of its brief. In that case, the Plaintiff was specifically relying on, or as the Court said, “leaning” on the illegal provision in order to recover. In our case, just the opposite prevails since Appellee has not relied on the disputed provision, Sec. 3 of the Agreement (Exhibit 2), at any time in claiming his rights.

In the case of *Local No .234 of the Plumbers Union v. Henley and Beckwith, Inc.* cited by Appellant at p. 19 of Appellant's brief, it should be noted first that the validity of the closed shop provision was tested against the Florida law and not against the National Labor Relations Act. Secondly, the Court in that case notes that there are "conflicting views on severability of closed shop clauses" and refers to anno. 14 A.L.R. 2d 846. The annotation referred to by the Florida Court, *supra*, sets forth:

"While it would seem that the provisions of the particular contract under consideration should govern, it may be noted that in the *majority* (emphasis supplied) of the few cases raising the question, it has been held or recognized that the provisions of the collective bargaining labor contract involved were severable." (Citing cases from Arkansas, Massachusetts, New Jersey, North Carolina and Tennessee.)

The Florida Court then entered its decision on the side favoring nonseverability rather than listing itself among the cases favoring severability.

Again, basic to the determination of the issue of severability are the rules of construction noted above that the Courts favor a legal construction of contracts and that doubts as to construction will be resolved

against the party who caused the contract to be prepared which latter rule received approval by the trial judge in our case when he made that statement (Tr. 168) quoted by Appellant at p. 21 of his brief.

Appellant's counsel points out that the National Labor Relations Board acts only to effectuate public policy and not to vindicate private rights. (Citing the *Haleston Drug Stores v. NLRB* in support thereof at p. 21 of Appellant's brief). Since Appellee was seeking relief from the Federal District Court under Sec. 301 of the National Labor Relations Act, he has no quarrel with this proposition as to what is required of the Board. Certainly there is no question but what Sec. 301 was enacted for the purpose of providing a forum for vindicating private rights. *Textile Workers Union v. Lincoln Mills of Alabama*, supra. Also no issue is made of the proposition that public policy is involved in the matter of closed shop provisions and collective bargaining agreements and this was appropriately considered by the Court in considering the issue of severability, the issue of validity, the question of whether plaintiff must rely on the invalid provision, if it is found to be such, in order to recover and the question of whether there has been discrimination coupled with an invalid provision as discussed above.

III.

The District Court did not err in refusing to grant the Appellant a new trial on the ground that the verdict of the jury was so grossly excessive as to be not supported by any evidence.

At the outset, we would say that we concur with Appellant that the instruction of the trial court as to damages became the law of the case. In this respect, it should be noted that colloquy between Court and counsel which took place when the Court's proposed instructions were in the hands of counsel (Tr. 183 and 184) gave specific notice to Appellant's counsel that damages for loss of business was an item of damage contemplated by the instructions where the following was said:

"Mr. Gladstone: Yes, Your Honor, We feel that one of the specific items of damage, it is an over all item, is the matter of the loss of the entire business.

The Court: Well, that is a different matter. Loss of an existing business, **

Mr. Gladstone: I mention his loss of business just as a preamble for the reason why we felt that it tied in. We feel that the jury should be instructed to determine the damages that reasonably

flow, that in determining the value of the business, they could consider the contacts that he had made, whether or not it would be reasonable that he would have continued in business for any period of time that was within reason and might reasonably could have expected, considering the tools, the equipment, that he had, the background that this man had, and the contacts that he had made, all of these things, just whether it would be reasonable for him to have continued in business, which would be an item appropriate for their consideration in determining the over all value of the business that he lost.

The Court: And would have got a construction contract for a million and a half dollars on which he might have made a profit of \$500,000 and, therefore, \$500,000 would be reasonable for the jury to award.

I will tell you, a verdict based on that kind of instruction, the verdict wouldn't be worth a plug nickle to you, the Court of Appeals would reverse it so fast you would have it right back here again, and I think I ought to instruct the jury that they shouldn't consider prospective profits on contracts which he doesn't have which he might get in the future. That doesn't keep you from arguing the business loss and what his prospects were on that.

Mr. Gladstone: May I ask, then, if our argument was along the line that I have outlined, would I be outside the instructions?

The Court: No, as long as you keep away from the profits which he might have earned on contracts which he might have procured had he stayed in business and which he didn't have at the time he quit.

Mr. Day: I was thinking, your Honor, of alluding, for instance, to the testimony of all of the adverse witnesses that there was a great demand or need for fabricators, subcontractors.

The Court: Well, that is business prospects in the light of the circumstances there. I don't think that that would be out of line."

Since Appellant's counsel admits the instructions became the law of the case and since the instructions plainly allowed the jury to allow damages for the loss of Appellee's business, Appellant cannot claim that error.

In our case under the general instructions, and the evidence and the reasonable inferences therefrom, the jury could well have found that Appellee's business was entirely destroyed as a result of the breach of contract by the Appellant. Appellant's citation of 25 C.J.S. Damages, Sec. 90 b, p. 633 at p. 26 of his

brief, although purporting to cover injury, interruption and *destruction* of a business, actually discusses only diminution in value. Nevertheless, that portion from the same authority at p. 811 would seem to be applicable, but it is important to note that there is nothing in this authority to indicate that it purports to set out the *exclusive* means of establishing value of a business.

The case of *U. S. v. Griffith, Gornall and Carmen, Inc.* cited by Appellant at p. 27 of his brief, is as they noted, a tort action rather than a contract action. If it had been a contract action, the Court would have referred specifically to the same authority (15 Am. Jur. Damages) but Sec. 133 thereof at p. 541, where it is said:

“The destruction or interruption of a business, or an injury tthereto, by the wrongful act of another is a proper element of damage, provided, of course, it is the natural and proximate result of such act, and the injured person is entitled to recover all such damages as are the natural and proximate result of the wrongful act complained of. If the injury results from a breach of contract, the parties may fairly be presumed to have contemplated that the breach would result in such injury. If it is certain that damages of this kind have been caused by the wrongful act

of the defendant, a recovery will not be denied because of uncertainty as to their amount."

Appellant then relies on this case as support for the proposition that future profits could not be recovered. We have no quarrel with this since as previously noted, the Court specifically excluded future profits from consideration by the jury in its instructions. Appellant argues that in that case there was an "established" business and seems to infer that Appellee did not have his business established. The jury could well have found that Appellee worked long and hard and tenaciously in getting his equipment together (Tr. 65), getting his business location (Tr. 63), getting lined up with the union in order that he might obtain union labor (Tr. 61), obtaining technical background information (Tr. 59), lining up his capital (Tr. 59), and attending to the many other details involved in his preparation for going into business and Appellant might point to circumstances where efforts were made by Appellant to prevent Appellee from getting a collective bargaining agreement which would have prevented him from getting union men and would have effectively prevented him from going into business, (Tr. 69, 70, 71 and 72). They nevertheless did not succeed. The jury could well have found that Appellee did get his collective bargaining agreement and he did commence business pursuant to the contract with the Lewis Hopkins Company (Tr. 76, 77 and 78)

and that Appellant did not succeed in preventing Appellee from becoming established in his business.

Appellant cites the case of *Southern Pacific v. Guthrie* at p. 29 of its brief in support of the proposition that the verdict is excessive. This was a tort case rather than a contract case. It is important to note there that this Court said:

“When the trial court is presented with a motion for a new trial grounded on a claim of an excessive verdict, its power to deal with the motion is not limited to questions of law. The same power and duty which the trial judge has to set aside any verdict and grant a new trial when he is of the opinion the verdict is against the weight of the evidence, is that which the trial court frequently exercises in ordering a new trial, or in conditioning denial of a new trial on a remittitur because, in the opinion of the court, the amount of the verdict is against the weight of the evidence. *But this power and duty belongs exclusively to the trial judge.* It is not for us to give directions in such a case, even although he may have declined to take action, such as we consider we would have done had we been in his place (citing *U. S. v. Socony Vacuum Oil Company*, 310 U. S. 150. 60 S. Ct. 811 (emphasis supplied)).

“We are convinced that even if we assume as we do, that (cases cited) were correctly decided, we cannot here reverse the action of the trial court unless the verdict can be said to be ‘grossly excessive’, or as stated in the *Affolder* case, ‘monstrous’. We think the verdict in this case cannot be so characterized.”

It is submitted that applying the rule of this case to our case, Appellant has not pointed out any facts which would indicate that the verdict is “grossly excessive” or “monstrous.”

Appellant next cites the case of *State of Washington v. U. S.* at p. 29 of his brief, where this court held:

“On the question of the sufficiency of the evidence to support a verdict ‘the evidence adduced by the opposing party shall be taken as true and all reasonable inferences deducible therefrom shall be given their most favorable intendment.’ (citing)

“Where there is substantial evidence on both sides of an issue, the Court is not free to reweigh the evidence and substitute its inference or conclusions for that of the jury (citing). However, in making the primary determination as to whether or not there is substantial evidence, a District Judge is not a ‘mere automaton’ (citing).

He must determine, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it.'

"The crux of the matter is whether there is substantial evidence to support the verdict. This has long been the rule of this Circuit Court."

It is interesting to note that the trial judge who heard the case of Appellee and reviewed the jury's verdict was the same judge who set aside the verdict in deference to the rule and his duty set forth in the cited case, and we can therefore say without fear of contradiction, that he was well aware of his obligation and his duty as outlined in the cited case when appellant's motion for new trial was presented.

The *Southern Pacific v. Guthrie* case was cited in the case of *Siebrand v. Gosnell*, 234 F. 2d 81 (Ninth Circuit) where the Court held:

"Siebrand Brothers attacked the \$95,000. judgment against them as excessive. We are required to consider the evidence in the light most favorable to the Gosnells***

"The Trial Court considered Siebrand Brothers contention on a motion for a new trial and denied the motion. The action of the trial judge on such

motion for new trial 'is not limited to questions of law', but he may 'grant a new trial when he is of the opinion the verdict is against the weight of the evidence*** (citing)."

"The power of the Court of Appeals is not as broad as that of the Trial Court. Absence the total want of evidence on all or certain portions of the case or the erroneous exclusion from consideration by the Trial Court of appropriate matters or a showing of bias or prejudice on the part of the jury, this Court may not reverse the trial court unless the verdict can be said to be grossly excessive or monstrous. (here citing *Southern Pacific Company v. Guthrie*). None of such elements are present in this case.

"****The Trial Court passed on the question on the motion for new trial and we cannot say that the verdict is so grossly excessive as to show an abuse of discretion on its part. (citing).*" (emphasis supplied)

Appellant cites the *Ford Motor Company v. Mahone* case at p. 29 of its brief in support of the proposition that a remittitur is not adequate. However, there the Court found specific facts and circumstances that occurred during the trial that gave rise to an excessive verdict resulting from pity and sympathy brought about by the Plaintiff appearing in a wheelchair be-

fore the jury. The Court also found that this was coupled with partisanship on the part of one of the jurors. (One of the jurors attempted to send Plaintiff's counsel a message designed to aid him in his conduct of the case during the trial.) We have no such circumstances even remotely approaching those facts in the case on appeal.

Appellant cites the case of *Stott v. Johnston* at p. 30 of his brief and Appellee would agree that this case does set forth a fair statement of the applicable law. Rather than taking one statement out of the context, however, the case would be more fairly presented if the statements of the court were more fully set forth as follows:

“***These were all simply instances of conflicting evidentiary considerations for the jury to resolve in the determination of plaintiff's right to recover damages for the alleged loss of good will. In such circumstances, there need be no citation of authority for the proposition that the jury's rejection of defendant's views and acceptance of plaintiff's claim are conclusive on this appeal.

“However, in a case of this kind there must be recognized the difficulty in the proof of damages put upon the plaintiff and there seems to be no

prescribed pattern of precisely what evidence should be introduce.***”

“The propriety of the allowance of \$10,000. to plaintiff for the loss of good will, must be considered in relation to the nature of the evidence available to plaintiff in proof of this issue. Analogous considerations have arisen in cases where recovery for loss of future profits was sought, and the Courts have been reluctant to reverse a reasonable damage award because the precise amount of damage was not definitely ascertainable. In this regard it appears to be the general rule that while a plaintiff must show with reasonable certainty that he suffered damage by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment. See Annotation 78 A.L.R. 858; 25 C.J.S., Damages, Paragraph 28, pages 493-496.

“***Under all the circumstances here, it is difficult to see what additional evidence Plaintiff could have introduced on the damage issue. The law only requires that the best evidence be adduced of which the nature of the case is capable, *Steel Duck Company v. Henger-Seltzer Company*, 26 Cal. 2d 634, 651, 160 P2d 804, and the defen-

dant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision. *Hacker Pipe & Supply Co. v. Chapman Valve Manufacturing Co.* 17 Cal. App. 2d, 265, 267; 61 P2d 944."

It is submitted that Appellee produced all of the evidence available to him on the matter of the value of his business. The jury could have, and apparently did find from the evidence reasonable certainty that Appellee was damaged in the loss of his business and that Appellant caused this damage and the jury then had the task of establishing the amount of loss of the damage but as has been repeatedly pointed out, recovery will not be denied because the damages are difficult of ascertainment.

CONCLUSION

Appellee respectfully submits that there was ample proof to justify a verdict by the jury concluding that there was an effect on interstate commerce which gave the court jurisdiction and that there was ample evidence to justify the verdict by the jury concluding that there was reasonable certainty that Appellee had suffered damage by reason of the breach of contract by Appellant and there was ample evidence to justify the verdict in the sum of \$40,000. Appellee further

submits that the facts presented in the Court below and the law applicable justify only one ruling which is that the contract on which the plaintiff sued was legal. Appellant should not therefore be granted a new trial and the verdict should be upheld.

Respectfully submitted,

GLADSTONE & DAY

Attorneys for Appellee.

United States Court of Appeals
For the Ninth Circuit

PLUMBERS & STEAMFITTERS UNION, LOCAL No. 598,
Appellant,

vs.

W. C. DILLION, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANT

J. DUANE VANCE
Attorney for Appellant.

230 Sixth Avenue North,
Seattle 9, Washington.



FILED

FEB 17 1958

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United States Court of Appeals

For the Ninth Circuit

PLUMBERS & STEAMFITTERS UNION, LOCAL No. 598,	<i>Appellant,</i>	} No. 15729
vs.		
W. C. DILLION,	<i>Appellee.</i>	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANT

A. JURISDICTION

This is an appeal by the defendant below, Plumbers and Steamfitters Union Local No. 598 (hereinafter called Plumbers Local 598 or Local 598) from a judgment against it in favor of the appellee, W. C. Dillion, in the sum of \$30,000, rendered by the United States District Court for the Eastern District of Washington, Southern Division.

Jurisdiction of the court below is claimed under Section 301 of the Labor Management Relations Act of 1947 (29 USC § 185) (Tr. 4).

Jurisdiction of this court to review is based upon 28 USC § 1291.

B. STATEMENT OF THE CASE

Plaintiff's amended complaint, on which the case was tried (Tr. 3-12), named as defendants in addition to the appellant three individuals who were officials of

the appellant union, to-wit: Cape, Beames and Lawson, and also three individual defendants who were engaged in the plumbing and heating business in the Tri-City (Pasco, Kennewick, Richland) area in Washington, to-wit: Head, Mokler, and Randolph. The amended complaint contained two causes of action. The first cause of action, on which the plaintiff asked for and was granted judgment against only the appellant union, was for breach of contract. The plaintiff alleged that prior to and about November 22, 1954, he had been desirous of establishing a pipe fabricating and installing and pipeline contracting business in the Tri-City area and that the officers of the appellant union were aware thereof (Tr. 4-5). Plaintiff further alleged that he did establish himself in a pipe fabricating and installing business and that 40 per cent of such pipe *as would be* fabricated and installed by plaintiff would have to be obtained from without the state of Washington (Tr. 5-6).

Plaintiff further alleged that on November 22, 1954, he entered into a contract with the appellant union referred to as Exhibit A (which became plaintiff's Exhibit 14 at the trial), under the terms of which contract by inference or implication the appellant union was required to furnish the plaintiff with employees (Tr. 6). Plaintiff claimed that the defendant arbitrarily refused to furnish such men to the plaintiff, and thereupon breached the agreement (Tr. 7).

Plaintiff alleged that he had obtained a contract for work (Tr. 5) and that the union had furnished him two men for a period of 48 hours (Tr. 8) whereby plain-

tiff became and was an employer within the meaning of the Labor Management Relations Act of 1947 (Tr. 8). Plaintiff claimed damages in the sum of \$50,000.

In his second cause of action the plaintiff complained against all of the defendants that they had combined and conspired to eliminate the plaintiff as a competitor in the pipe fabricating and pipeline business in the Tri-City area in the state of Washington, in violation of the Sherman Anti-Trust Act and prayed for \$50,000 damages to be trebled (Tr. 9, 10, 11).

At the close of the plaintiff's case, all defendants moved for dismissal and for a directed verdict by reason of the insufficiency of the evidence in general (Tr. 159-168) and specifically on the insufficiency of the evidence to establish interstate commerce to warrant jurisdiction of the court (Tr. 163). The court granted the motion for directed verdict on the second cause of action; that is, the action based upon the Anti-Trust Law (Tr. 169-181). Accordingly, verdict and judgment in favor of the defendants on the second cause of action was entered (Tr. 31, 32) and no appeal was taken therefrom, and that matter is in no way now before the court.

The appellant union answered the first cause of action (on breach of contract) generally admitting the description of the parties, and the contract identified as Exhibit A (subsequently plaintiff's Exhibit 14), denying commerce and the jurisdiction of the court based thereon (Tr. 20, 21) and setting up as a fifth defense the defense of illegality of the contract sued on, pleading, *inter alia*,

“The alleged collective bargaining agreement set forth in the Amended Complaint is illegal and void and contrary to public policy in that plaintiff and defendant union agreed to and enforced and maintained and attempted to enforce and maintain a collective bargaining agreement, including among other things, Section 3 thereof, a provision reading as follows:

“ ‘Hiring and Discharge

“ ‘Section 3. The employers agree to hire all employees covered by this agreement from and through the unions and to retain in its (*sic*) employ only members in continuous good standing in the unions. This is to include foremen, general foremen and superintendents.

“ ‘The employers agree to forthwith discharge any employee upon written notice from the union that such employee is not in good standing in the union.’

“That by reason of executing such a collective bargaining agreement and thereafter attempting to enforce and maintain said collective bargaining agreement, the plaintiff and defendant local union did engage in unfair labor (18) practices within the meaning of Section 8 (a) (3) and Section 8 (b), subsections (1) (A) and (2) of the National Labor Relations Act as Amended (61 Stat. 136).” (Tr. 25, 26)

The quoted language is from Exhibit 2, incorporated by reference into Exhibit 14.

At the close of plaintiff’s case motions to dismiss, as stated above, were made by appellant union (Tr. 159, 163). The court, in the interest of saving time, prior to argument indicated a ruling adverse to the appellant

on the question of illegality of the contract (Tr. 167, 168) and, after argument, denied the motions on the breach of contract cause. At the close of all of the evidence, appellant union again moved for dismissal on the ground of the insufficiency of the evidence and the illegality of the contract in question (Tr. 181) and this was denied (Tr. 181). Verdict was rendered against the appellant on January 18, 1957, in the sum of \$40,000 (Tr. 32). Motions for judgment notwithstanding the verdict or for a new trial were filed by the appellant union on January 25, 1957 (Tr. 33, 34). These motions were heard on the 7th day of June, 1957, and the court, by its order dated June 12, 1957, ordered a new trial unless the plaintiff consented to *remittitur* of \$10,000 (Tr. 35, 36). Such a consent to *remittitur* was filed (Tr. 36, 37) and this appeal followed by notice on July 5, 1957 (Tr. 37).

For the purposes of this appeal, it was established by the jury's verdict upon controverted evidence that appellant union refused to furnish available men to the plaintiff. There being evidence upon which the jury could so find, appellant union treats this herein as an established, but not admitted, fact.

Plaintiff had only one contract and the case substantially arises from the cancellation of this contract by the general contractor because of the plaintiff's inability to complete the same. It is therefore, necessary to describe the relationships involved in this contract.

The prime contract of the general contractor, Lewis Hopkins, was for the construction of what is known as an outfall line at the Hanford Project of the Atomic

Energy Commission (Tr. 231, 232). This is a structure designed to discharge radioactive waters into the Columbia River (Tr. 231, 232). A building called a surge chamber about the size of a small two-story house of concrete construction was built about 90 feet from the river. About 700 feet of pipe of 66-inch diameter and 1½-inch thickness is laid into the river leading the radioactive water into the middle of the Columbia River (Tr. 232, 233). This pipe was furnished by the Atomic Energy Commission at the job site (Tr. 71, 453). The government prepared a fair cost estimate before it let the bids. The fair cost estimate of the prime contract which was let to the Lewis Hopkins Company (Tr. 237, 238) was \$125,000. The bid of the Lewis Hopkins Company was \$137,777 (Tr. 238). The government's fair cost estimate of the mechanical contractor's portion of the contract was \$25,000 (Tr. 29). That covered the bringing of the 90 feet of pipe from the surge chamber to the river bank and putting the 700 feet of pipe out into the middle of the river (Tr. 239, 240). Included in the fair cost estimate was the sum of 10 per cent for profit, so the government figured the profit on the mechanical contract portion at approximately \$2500, although it is a little bit more since 10% for profit allows 10% for profit on the usual 10% for overhead (Tr. 269).

The notice to proceed by the government to the Hopkins Company was issued on November 17, 1954, and received by Hopkins on November 19, 1954 (Tr. 254) and the contract was to be completed within 120 days after such notice (Tr. 254, 255).

Lewis Hopkins, d/b/a Lewis Hopkins Company,

awarded the subcontract for the mechanical construction to the plaintiff, Dillion (Plaintiff's Exhibit 18) (Tr. 85). Although undated, it was actually signed on the 23rd or 24th of November (Tr. 89), and was not to be effective unless the plaintiff secured a contract with the union (Tr. 89). Likewise, the designation of the percentage for overhead and profit was never filled in on Exhibit 18. Plaintiff testified that it was to be 25 per cent (Tr. 88). This, of course, was overhead *and* profit. It was a time and material contract. On December 4, 1954, some eleven days after granting the contract to Dillion, Lewis Hopkins cancelled the contract because of the inability of the plaintiff to perform (Exhibit 53) (Tr. 100). Dillion was paid in full for his work and expense to that time (Tr. 100, Exhibit 32). Hopkins thereafter employed the firm of Thorn and Marble, who did the same work as Dillion would have done under the contract (Tr. 101). Thorn and Marble did exactly the same work that Dillion would have done under the contract (Tr. 100, 660). The materials and labor furnished by Thorn and Marble, as would have been furnished by Dillion, is shown by Exhibit 54 (Tr. 102). Hopkins paid Thorn and Marble approximately \$13,700, inclusive of overhead and profit (Tr. 103). Dillion testified he would have done the work just as well as Thorn and Marble and in the same way (Tr. 93). He could have done it just as neat and just as cheaply (Tr. 93).

The plaintiff-appellee is a journeyman member of the appellant Union and has been since about 1942 (Tr. 281). He had been planning for some time to go into

business (Tr. 282), and first talked to representatives of the appellant union around June or July of 1954 and then again in September, 1954 (Tr. 285). Plaintiff leased some space at the Pasco Airport for a shop in September or October (Exhibit 9, Tr. 63), and got a telephone (Exhibit 8, Tr. 63). He got the miscellaneous licenses, business cards, and checkbooks necessary for the purpose (Tr. 64, 65). He had started acquiring some tools and equipment prior to that time. He procured a winch truck in a trade (Tr. 65), and had procured two welding machines, pipe dies and pipe wrenches, etc. (Tr. 65). One of the welders cost \$337.50 (Tr. 82), the other about \$300 (Tr. 82). On the basis of his shop and his contract with Hopkins, he obtained his contract with the Union (Exhibit 14) November 23, 1954 (Tr. 92). When his contract was cancelled by Hopkins on December 4, he closed up and sold his equipment and made no further effort to continue in business (Tr. 81). According to counsel's summation to the jury (Tr. 186-194), Dillion's damages were as follows:

Bond premium, payroll checks, phone, rent, insurance, etc. (Tr. 189, 190).....	\$ 207.58
Traveling and time acquiring equipment, materials and making contacts in the business:	
Mileage	300.00
Time (Tr. 190).....	2,500.00
(It is to be noted this includes the making of contacts for the procuring of other business, none of which he ever secured) (Tr. 87, 88, 93, 94)	
Percentage to be paid plaintiff on the Hopkins contract, \$5,750 (Tr. 192)	
Figuring fifty per cent of this figure for overhead and 50 per cent for profit, we deduct one-half of \$5,750.....	2,875.00

All of the equipment purchased for the business, \$3,069.50, less sales of portions thereof, \$2,350 (Tr. 192)	1,719.50
	<hr/>
	\$7,602.08

As to damages the court instructed the jury as follows:

“In accordance with the general principles governing the allowance of damages, a party to a contract who is injured by its breach is entitled to compensation for the injuries sustained and is entitled to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed. The measure of damages for the breach of the agreement between the defendant union and the plaintiff is the amount which would have been received if the contract had been kept, which means the value of the contract, including the profits and advantages which are its direct results and fruits. A recovery may be had both for gains prevented and losses sustained by reason of the breach, including the loss of prospective profits and the plaintiff's loss of time while engaged in the performance of the contract.

“It is not necessary that you determine the amount of the damages to the exact dollar and cents figure, a reasonable estimate is sufficient, but the amount should be based on the evidence and not on speculation or conjecture on your part.

“In an action for damages for breach of contract, the fundamental principle is full compensation for the wrong done. The general rule is that compensation shall be equal to the injury. The breach is the measure by which the compensation is to be measured, and all that the law requires is

that such damages be allowed as in the judgment of fair men and women directly and naturally resulted from the breach.

“Now, if your verdict should be for the plaintiff, you may not properly include in the amount awarded supposed or claimed profits which the plaintiff might have received from contracts other than the Hopkins contract. Profits of the latter nature would be wholly speculative and/or conjecture and not supported by the evidence in the case.” (Tr. 207, 208) (Emphasis supplied)

Plaintiff's counsel took no exceptions to the damage instructions (Tr. 212-218).

There is not one syllable of evidence in the record that the plaintiff ever purchased or transported anything in interstate commerce, or that he would have in the performance of the Hopkins contract, purchased or transported anything in interstate commerce, or that Thorn and Marble who did the work exactly as plaintiff would have under this contract, and furnished the same materials as plaintiff would have under this contract, purchased or transported anything for this contract in interstate commerce. All steel pipe over 24 inches in diameter is shipped in from outside the state of Washington and had plaintiff actually been engaged in the fabricating business—as distinguished from installation work such as called for by the Hopkins contract—he would have furnished such pipe (Tr. 90-91).

No steel pipe is actually manufactured within the State of Washington (Tr. 43).

C. SPECIFICATION OF ERRORS

The appellant contends that the District Court erred as follows:

(1) In failing to grant appellant's motion to dismiss made at the close of plaintiff's case and renewed at the close of all of the evidence and in failing to grant judgment notwithstanding the verdict on two grounds:

- (a) The evidence failed to show the existence of interstate commerce within the meaning of the Labor Management Relations Act of 1947 (29 USC 151 ff) to establish the jurisdiction of the District Court and therefore the court was without jurisdiction; and
- (b) The contract on which the plaintiff sued was illegal, contrary to public policy and void and no action can be maintained thereon.

(2) In refusing to grant the appellant a new trial on the ground that the verdict of the jury was so grossly excessive under the applicable law and the instructions of the court as to be not supported by any evidence.

D. SUMMARY OF ARGUMENT

The burden of establishing the facts essential to the jurisdiction of the District Court rested upon the plaintiff and in this case upon proof of interstate commerce within the meaning of the Labor Management Relations Act of 1947 (29 USC, §§ 151, 152). There was an utter failure of proof that the plaintiff ever engaged in interstate commerce or would have engaged in interstate commerce in the performance of the contract which he had. The jurisdiction of the court cannot be

based upon a claim of commerce in proposed future activities of the plaintiff that were speculative.

The contract between plaintiff and defendant was one clearly made illegal by the Labor Management Relations Act of 1947 (29 USC §§ 157, 158) and is contrary to the public policy of the United States in that the same contained an illegal closed shop section and therefore neither party thereto may bring an action for its breach and in particular where, as here, the breach, if any, of the agreement involved the very subject which the illegal portion of the contract covered, to-wit: hiring and furnishing of men.

As to damages, assuming that view of the evidence most favorable to the plaintiff, there was no evidence, which under the applicable legal measure of damages or the court's instructions thereon on which plaintiff could recover more than about one-fourth of the total verdict. Therefore the verdict should have been set aside and the appellant granted a new trial.

E. ARGUMENT

I.

The Evidence Failed to Show the Existence of Interstate Commerce Within the Meaning of the Labor Management Relations Act of 1947 (29 USC 151 ff) to Establish the Jurisdiction of the District Court and Therefore the Court Was Without Jurisdiction

It is axiomatic that the jurisdiction of the Federal Court must be clearly and affirmatively shown. 54 Am. Jur., Court, §§ 136, 137, 138, 139, 140. *Thomas v. Ohio State University Trustees*, 195 U.S. 207, 49 L.Ed. 160.

The cause here involved is based clearly and entirely on the Labor Management Relations Act (Tr. 4, par. II) which is in turn based on the commerce power of Congress. 29 USC §§ 151, 152.

The appellant specifically called the court's attention to the lack of proof of commerce in the motion to dismiss or for directed verdict at the close of plaintiff's case in the following language (Tr. 163):

"In both causes of action the court's jurisdiction rests upon the jurisdictional statute relating to acts based upon commerce and insofar as the acts, both statutes involve (*sic*, involved) the anti-trust act and the Labor Management Relations Act which are both bottomed on commerce, of course, my motion would go as well to the insufficiency of the evidence to sustain the jurisdiction of the court on commerce."

This motion was renewed at the close of all the evidence (Tr. 181).

The complaint indicated that the plaintiff-appellee did not rely upon any actual commerce. In the complaint, the plaintiff alleged (Tr. 5-6):

"Such pipe as *would be* fabricated and installed by plaintiff * * * he would be required * * * 40 per cent of which * * * *would have to be* obtained from without the state of Washington * * *. In such business plaintiff *would be* fabricating and installing pipe, carrying liquids and gases across state lines, etc." (Tr. 5-6) (Emphasis supplied)

The plaintiff never purchased anything in interstate commerce—he never sold anything in interstate commerce.

In the performance of the Hopkins contract, he

would not have been required to purchase any material in interstate commerce and since pipe was furnished on the job site and the job was primarily a labor job would not have furnished any substantial quantity of material, which might or might not have come in interstate commerce (Tr. 173). (The total material furnished by the mechanical contractor was less than \$500 (Ex. 54) and hence *de minimis* assuming that it came in interstate commerce, which was not proved.) The plaintiff would not have sold any goods in interstate commerce under the Hopkins contract since it was an installation job on the project.

The plaintiff never had any other contract for work and there was no evidence that he performed any work or had agreements to perform work or agreements to purchase or sell materials from or to any persons other than in connection with the Hopkins contract (Tr. 58-95).

Assuming Congress exercised its full power in the Labor Management Relations Act, the above-stated posture of the facts puts plaintiff's activities outside the regulatory power of Congress, as shown by *Fairway Foods Inc. v. Fairway Markets Inc.* (9th Cir. 1955), 227 F.(2d) 193, where this court said:

“While it is thought that activities which in isolation might be deemed local, may affect commerce due to interlacings of business across state lines, in the absence of a showing that the business is part of a coordinated interstate system substantially affecting commerce, the activities of retail grocers purchasing and selling their wares exclusively intrastate are not a permissible field for

Congressional regulation under the commerce power.”

In *Groneman v. I.B.E.W.* (10th Cir.) 177 F.(2d) 995, an action was brought by a carpentry contractor who purchased for the particular contract out of which the dispute arose some \$6,000 worth of materials in interstate commerce. The court stated the question as follows at page 997:

“Assuming then that this labor dispute was unlawful and that it interrupted commerce to the extent of \$6,000, can it be said that this has such an effect upon commerce as is sufficient to give the court jurisdiction under the Act * * * (citing *NLRB v. Fainblatt*, 306 U.S. 601, 83 L.Ed. 1014)

The court said:

“Considered in the light most favorable to appellant the impact of this labor dispute upon commerce, in any event, is so trifling and microscopic as to bring it within the above pronouncement by the Supreme Court and requires the application of the *de minimis* doctrine.”

Of course, had the plaintiff become a large-scale pipe fabricator and/or pipeline contractor he would have been engaged in interstate commerce and the mere fact that his investment was limited to some \$3,000 is not enough to negate this event. However, this event was at best a speculative possibility and is not sufficient to warrant the jurisdiction of the court. The trial court itself in this connection said (Tr. 172):

“As I think I indicated in my remarks from the bench here, I can’t see where the Hopkins contract could possibly involve a restraint of interstate commerce as it is defined for purposes of the Sherman Act in the decisions.

“The pipe was furnished; all that the contract called for was welding it and putting it into place; and I thought it was very significant the length to which counsel for the plaintiff was required to go in trying to meet the court’s objections or comments from the bench in suggesting that the supplies that were used in welding pipe could be the subject of substantial interstate commerce which would be restrained in this case.”

* * * (Tr. 173): “I don’t think that future intentions of one engaged in an industry can be regarded as actually affecting interstate commerce * * *.”

It is not clear where or how the court justified its jurisdiction under the Labor Management Relations Act in the face of these pronouncements from the bench.

Carrying out this thought the court instructed the jury specifically that as to damages they could allow no recovery for any loss of profits on any contract or job other than the Hopkins job because to do so would be “wholly speculative and/or conjecture and not supported by the evidence in the case (Tr. 208).” By failure to object plaintiff’s counsel acquiesced in this proposition. Appellant respectfully submits that it is equally speculative and/or conjecture that there was or would be any contracts involving commerce. Naturally, every self-employed machinist hopes ultimately to be a second General Motors, and every chemist a DuPont, but these aspirations and hopes do not open the doors of the Federal Courts to their grievances on the ground that they hope to be in commerce nor does it erase the demarcation of our Federal system between Federal and state regulation. Since hope springs eter-

nal, to give such broad effect to it, would be to do what the United States Supreme Court said could not be done in these words:

“effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 81 L.Ed. 983, quoted by this court in the *Fairway Foods* case, *supra*.

Appellee is not shorn of his substantive rights by reason of the non-accessibility of the Federal Court, for labor unions may sue and be sued in their own name as legal entities in the state of Washington, *Pacific Typesetting Co. v. I.T.U.*, 125 Wash. 273, 216 Pac. 358, nor has the statute of limitations run on his claim. *McDonald v. Wockner*, 44 Wn.(2d) 261, 267 P.(2d) 97.

II.

The Contract on Which the Plaintiff Sued Was Illegal and Void and No Action Can Be Maintained Thereon

Section 3 of the Washington State Agreement (Exhibit 2) which was incorporated by reference into plaintiff's contract (Exhibit 14) required all employees to be hired through the appellant union—including supervisors—and provided for immediate discharge of all employees not in good standing with the union. Such a provision constituted a “closed shop” and is clearly illegal under the Labor Management Relations Act. *NLRB v. Alaska Steamship Company* (C.A. 9), 211 F.(2d) 357; *NLRB v. NMU*, 175 F.(2d) 686.

In *Lewis v. Jackson and Squire*, 86 F.Supp. 354 (appeal dismissed, 181 F.(2d) 1011), an action was

brought by the trustees of a welfare fund to collect payment of the contributions by the employers thereto as required by the collective bargaining agreement. A defense was that the collective bargaining agreement contained an illegal hiring provision. In dismissing the action, the court said:

“This action of the union conclusively demonstrates that the union shop provision was deemed absolutely essential. It follows, therefore, that the unlawful union shop provision, an essential and inseparable part of the agreements, taints and renders unenforceable all parts of the agreements, including, of course, the provisions relating to payments to the welfare and retirement fund. Also, due to the public interest involved, the defendants may assert the defense of illegality of the agreements even though they were parties thereto.”

Local Union No. 420 v. Carrier Corp., 130 F.Supp. 26, involved a contract by a local union of plumbers wherein the employer agreed that certain work would be subcontracted only if members of the plaintiff local did the work. The employer refused to comply with this provision and subcontracted work to a subcontractor who assigned the work to members of another union. The plaintiff union sought damages for this breach. The employer maintained that the contract was illegal under Sec. 8 (b)(4)(D) (29 USCA Sec. 158). (The illegality here arises under Sec. 8 (a)(3)). The court granted a motion for dismissal on the pleadings, saying:

“The very thing contemplated by (the clause) in the collective bargaining agreement upon which plaintiff leans is that specifically denoted an unfair

labor practice by Section 8 (b) (4) (D) of the Act. The Board not only found this particular section of the contract 'illegal insofar as it provides that the undisputed rigging work will be done only by mmebers of Local 40' but that the 'fabric of illegality' ran 'through the entire contract.'

"Having in mind the finding of the Board, with which I am in complete accord, and the subsequent injunctive proceedings in this court with its affirmance by the Court of Appeals, there is not the slightest doubt in my mind but that the motion to dismiss must be granted because *the action is based upon an illegal and unenforceable contract.*"

Local No. 234 of the Plumbers' Union v. Henley & Beckwith, Inc. (Fla. 1953) 66 So.(2d) 818. There a contract very much like the one in issue here was entered into by the plaintiff employer and the defendant union prior to the proscription of closed shop contracts by the Labor Management Relations Act of 1947. It was, however, in contravention of the law of the state of Florida which prevented union security clauses of any kind. The employer brought an action for declaratory judgment. The union's motion for dismissal was granted on the ground that the union security clause was violative of the public policy of the state of Florida and that the hiring provisions were indivisible from the remaining portions of the contract and hence the entire contract was void and unenforceable at the instance of the employer.

The Supreme Court of the state succinctly stated the question as follows, at page 820:

"Two questions are presented in this proceeding: (1) Whether Article 7 of the contract is vio-

lative of the public policy of this state because it attempts to create a closed shop status between the union and the employer; and (2) Assuming that Article 7 is a provision for a closed shop, *whether it renders the whole contract void.*" (Emphasis supplied)

After finding the violation of public policy, the court said as follows at page 821:

"Consequently, the contract to which Article 7 applies must fall unless it can be said from a fair construction of the contract that Article 7 can be severed therefrom without doing violence to the intentions of the parties as to the remainder."

Then the court discussed at length at page 821 the rules applicable to the determination of whether or not such contracts are divisible or entire. The court held that the contract there, which was in principle the same as the contract here, was indivisible and void in its entirety, saying at page 822:

"Thus, it appears that in the contract a set of promises on one side is exchanged for a set of promises on the other; and it is impossible to conclude that the very significant promise on one side, namely the closed shop agreement appearing in Article 7, can be entirely eliminated from the contract and still leave a valid working arrangement fairly reflecting the original mutual understanding between the parties."

The court also said at page 823:

"Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties. *Brumby v. City of Clearwater, supra*. Because of this the defendant may assert the invalidity of the contract even though he is a participant in the wrong."

On the motion to dismiss, the trial court indicated that he felt the union could not now raise the question of the illegality of the contract because of something in the nature of an estoppel. The court said (Tr. 168):

“ * * * I don't like to base it on the principle of estoppel, but maybe a second cousin to it. I don't think they should be permitted now to say, 'This contract, which we gave you and which we required you to take and which you had to have in order to perform your contract, we now claim that there was an illegal provision in it and we are going to take advantage of that illegal provision and prevent you from recovery'.”

The union in entering into such an illegal agreement was not entering into an agreement from which it could suffer no penalty and thereby sit back and claim or not claim the benefit thereunder as it saw fit. Such agreements are so contrary to public policy as set forth in the Labor Management Relations Act that the union subjected itself to the possible imposition of substantial penalties by entering thereinto.

The union or the employer or both may be required, by an NLRB back-pay award, to make whole any person suffering loss by reason of discrimination in employment arising out of such a contract. *NLRB v. Alaska Steamship Co.* (C.A. 9) 211 F.(2d) 357.

In enforcing the Act in such particulars the NLRB is acting only to effectuate public policy and not vindicate private rights: *Haleston Drug Stores v. NLRB* (C.A. 9) 187 F.(2d) 418, cert. denied, 342 U.S. 815. This illustrates the degree to which public policy is involved.

Ordinarily the existence of a contract of reasonable

duration will bar an election at the behest of another union seeking to represent the same employees but the Board has consistently held that where such an existing contract contains an illegal union security clause, as here, it will not be such a bar. *Seaboard Terminal & Ref. Co.*, 109 NLRB 1094; *Ira Grob, Inc.*, 110 NLRB 626; *Kaye Novelty Co.*, 107 NLRB 26.

To further illustrate the public policy involved and the extent to which the union exposes itself by the execution of such an agreement, the Board may and has adopted the principle of requiring the reimbursement of all dues and other charges collected from its members pursuant to such a contract. See Twenty-first Annual Report of the NLRB 1956, pages 103, 106, and *United Association of Plumbers, etc.*, 115 NLRB 594

There can be no question therefore that contracts containing such provisions are totally void.

In 17 C.J.S., Contracts, Secs. 277 and 280, pages 668 and 669, it is stated as follows:

Sec. 279-a: "Ordinarily illegal contracts may not be validated by ratification.* * * "

b: "Waiver. The defense of illegality cannot be waived.* * * "

c: "Estoppel. Illegal contracts cannot be validated by the invocation of an estoppel.* * * "

"An agreement void as against public policy or because prohibited by law cannot be rendered valid by invoking the doctrine of estoppel.* * * "

III.

The District Court Erred in Refusing to Grant the Appellant a New Trial on the Ground that the Verdict of the Jury Was So Grossly Excessive as To Be Not Supported by Any Evidence

The instruction of the trial court as to damages was not excepted to by either party and therefore became the law of the case. We therefore refer here to the instruction of the court in that regard (Tr. 207, 208):

“In accordance with the general principles governing the allowance of damages, a party to a contract who is injured by its breach is entitled to compensation for the injuries sustained and is entitled to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed. The measure of damages for the breach of the agreement between the defendant union and the plaintiff is the amount which would have been received if the contract had been kept, which means the value of the contract, including the profits and advantages which are its direct results and fruits. A recovery may be had both for gains prevented and losses sustained by reason of the breach, including the loss of prospective profits and the plaintiff's loss of time while engaged in the performance of the contract.

“It is not necessary that you determine the amount of the damages to the exact dollar and cents figure, a reasonable estimate is sufficient, but the amount should be based on the evidence and not on speculation or conjecture on your part.

“In an action for damages for breach of contract, the fundamental principle is full compensation for the wrong done. The general rule is that

compensation shall be equal to the injury. The breach is the measure by which the compensation is to be measured, and all that the law requires is that such damages be allowed as in the judgment of fair men and women directly and naturally resulted from the breach.

“Now, if your verdict should be for the plaintiff, you may not properly include in the amount awarded supposed or claimed profits which the plaintiff might have received from contracts other than the Hopkins contract. Profits of the latter nature would be wholly speculative and/or conjecture and not supported by the evidence in the case.”

Appellants' position is that there is *no* evidence in the case, which, under that instruction, would warrant the verdict of \$40,000 or the judgment of \$30,000 after the filing of the *remittitur*.

We turn to counsel's summation to the jury for the view of the evidence on damages most favorable to the plaintiff (Tr. 190-193). First he claims miscellaneous expenditures for insurance, payroll checks, phone, rent, etc., \$207.58. He then claims expenses of travel of 3,000 miles at 10 cents a mile, and 500 hours at 5 dollars an hour for going around making business contacts (Tr. 190). Then he claimed profit under the contract at 25% of an estimated gross of \$23,000, or the sum of \$5,750. He had purchased \$3,069.50 worth of equipment which he sold part of for \$2,350 for loss of \$1,719.50. This would come to a total loss to plaintiff of \$10,477.08. On what could the jury possibly give the plaintiff an additional sum of nearly \$30,000?

Not essential to this argument but as a makeweight

it should be pointed out that not all of the 25 per cent would be profit for overhead has to be computed at probably 10 per cent or \$2,300, if the \$23,000 figure were accepted. It is probably also true that the conclusive evidence of the actual gross value of the contract by which the plaintiff is bound is the sum of less than \$14,000 paid to Thorn and Marble for its actual execution since plaintiff himself testified he could have done it as cheaply and well as they. If this figure were accepted his profit would be \$3,500 less overhead of 10 per cent, or \$1,400, or a net of \$2,100, rather than the \$5,750 suggested by counsel.

But for the purposes of this argument, passing these points, and assuming the over-all total of \$10,477.08, what additional item or items of damages are there for which the plaintiff may be compensated? Appellant submits there are none. There is no catch-all in a breach of contract action and juries are not permitted to simply pull general figures out of the air. Courts are accustomed to personal injury actions wherein there is always a claim for pain and suffering by way of general damages and there may be some tendency to permit such evaluations erroneously to carry over into contract actions. The trial court intimated in conference that possibly the loss of business was an over-all item (Tr. 183). Such, however, was not carried over into the instructions to the jury where counsel could properly except (and it would have been error, as hereinafter shown) and there was nothing in the damage instruction as quoted above which would warrant the jury in awarding to the plaintiff any sum whatsoever for loss

of business. The plaintiff was in business only from the time of his contract on November 23, 1954, to December 4, 1954, a period of some 10 or 11 days. He had no regular and established business. The only business he had was the Hopkins contract. In recognition of this, the court specifically instructed the jury that they could not award the plaintiff anything by way of loss of future profits for the reason that the same would be wholly speculative and conjectural. It is respectfully submitted that this was correct, as well as being now the law of the case for want of exception, and that to allow any recovery for "loss of business" would be contradictory thereto and would be to allow the jury in fact to give the plaintiff recovery for loss of profits. The only monetary value of "loss of business" is "loss of profits" and as will be shown, the cases and authorities treat them as interchangeable. 25 C.J.S., Damages, § 90 b, p. 633, says as follows:

"Where a regular and established business is injured, interrupted, or destroyed, the measure of damages is the diminution in value of the business by reason of the wrongful act, and in order to establish the diminution in value, it is necessary to show the usual profits from the business. Hence, the rule has been announced that, where an established business had been interrupted, the measure of damages is the loss of profits, together with such expenses as continue while the business is interrupted." (Emphasis supplied)

The same authority says in the same volume at page 811:

"A party claiming to have been wrongfully prevented from completing a contract may introduce

evidence as to his expenditures for work and materials in part performance, and, in connection with loss of profits, the probable cost to him of completing the contract, and the amount bid by a third party to complete the job. Where plaintiff has an *established business*, evidence of the *expenses and income of such business for a reasonable time before the interruption of such business* is admissible as a basis for estimating future profits." (Emphasis supplied)

Likewise the same authority says at page 831:

"There can be no award of damages for breach of contract where there is no proof that damages have been sustained by the breach or no evidence by which the amount of damages can be measured, except, in some cases of nominal damages."

A tort action involving a claim for damages similar to those here claimed was involved in *U.S. v. Griffith, Gornall, and Carman, Inc.*, 10 Cir. 210 F.(2d) 11. In that case the plaintiff was a corporation engaged in doing construction work. It had a contract with a city to lay a water pipe for \$43,000. The pipeline crossed land adjacent to an Air Force base. The United States Government was negligent in the maintenance of the Base, causing plaintiff's work to be flooded with substantial loss to him and he brought an action under the Federal Tort Claims Act, claiming that his business was destroyed. The trial court allowed him a figure of \$15,000 for "injury and impairment of business, loss of earnings, destruction of credit, and reduction of net worth." This latter amount was disallowed by the Court of Appeals on the ground that there was no substantial

evidence to sustain the judgment. The court said at page 13:

“In a tort action, damages for the loss of profits and for injury to or interruption of a business, will be allowed only when they can be established with reasonable certainty and are the proximate result of the wrong complained of. No recovery can be had for such losses if they are uncertain, conjectural, or speculative. 15 Am. Jur., Damages, §§ 150, 157.

“Prospective profits are necessarily somewhat uncertain and problematical, but in cases where damages are definitely attributable to the wrong of the defendant and are only uncertain as to amount, they will not be denied even though they are difficult of ascertainment. (Citations) *The loss of future profits from a regularly established business may in proper cases be established by showing that the profits after the wrong are less than past profits.* (Emphasis supplied)

* * * (Citations) * * *

“This is often the only available evidence. The fact of damage, however, must be proved to a certainty. Mathematical exactness as to the amount is not required but the evidence must form a basis for a reasonable approximation. The court must have before it such facts and circumstances to enable it to make an estimate of damage based upon judgment, not guesswork.”

The Court of Appeals further said at page 14:

“There was no evidence of any particular jobs which the plaintiff might have bid upon, or that it would have been the low bidder if it had so bid; or that the jobs would have been profitable contracts if it had been the successful bidder. No evi-

dence was introduced to show that the plaintiff had been denied bond or had inquired of any surety company or others if a bond would be furnished if it were a successful bidder at a contract letting or for other contracts which might have been obtained. Plaintiff's testimony indicates that it did not operate the year round; and that weather conditions controlled its operations materially. No evidence was introduced to show that weather conditions would have permitted work if it had been a successful bidder or obtained a sub-contract. *What the loss of profits or damage to plaintiff's business would have been, if any, is pure guess-work on the part of plaintiff's president and far too speculative to sustain a judgment for this claim.*" (Emphasis supplied)

In that case the plaintiff at least had an established business to be damaged. The fact that the United States Government was the defendant does not make the measure of damages or degree or nature of required proof any different than in this case where a union is the defendant.

There being no evidence to sustain the verdict, the court committed an error of law in failing to grant appellant a new trial. *Southern Pacific v. Guthrie* (9 Cir.) 186 F.(2d) 926. Evidence to support a verdict must be substantial. *State of Washington v. U.S.* (9 Cir.) 214 F.(2d) 33, 41.

In such a case *remittitur* as imposed by the trial court is not adequate. *Ford Motor Company v. Mahone*, 205 F.(2d) 267.

The matter of loss of good will as an item of general damages was considered at length by the California Su-

preme Court. *Stott v. Johnston*, 36 Cal.(2d) 864, 229 P.(2d) 348. That was an action by a painting contractor against his supplier for furnishing him with defective paint which caused loss and damage to his business. It is interesting to note that he produced testimony of his net earnings for three years immediately preceding the loss. The court stated as to the allowance of a loss for good will:

“Analogous considerations have arisen in cases where recovery for loss of future profits was sought.”

The court then cites with approval and with emphasis added from an earlier case, as follows:

“ ‘Where the operation of an *established* business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales’.”

It is respectfully submitted that it is conclusively established that the jury, either through sympathy for the plaintiff or prejudice against the appellant, failed either to follow the court's instruction or the evidence, and that under the law both generally and as established in this case by the instructions of the court, there is no evidence to sustain the jury's verdict, and therefore the court erred in denying the appellant a new trial. As further suggested in *Ford Motor Company v. Mahone, supra*, where the prejudice or sympathy of the

jury is established by its erroneous damage award, the verdict on the controverted liability questions is likewise infected and the only remedy is by a new trial on both issues.

F. CONCLUSION

Appellant respectfully submits that the judgment of the court below should be reversed and the case dismissed for failure of proof of interstate commerce justifying the imposition of the Federal law and/or the jurisdiction of the Federal Court and on the further ground that the contract on which the plaintiff sued was illegal, contrary to public policy and void and no action could be maintained thereon, or that alternatively, should the court rule contrary to appellant on those points, the judgment of the trial court should be reversed with instructions to grant to appellant a new trial.

Respectfully submitted,

J. DUANE VANCE

Attorney for Appellant.

APPENDIX A

**MATERIAL PORTIONS OF LABOR-MANAGEMENT
RELATIONS ACT OF 1947****Title 29, U.S.C.A. §151. Findings and declaration of
policy.**

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or in-

terruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, §101, 61 Stat. 136.

Title 29, U.S.C.A. §152. Definitions.

When used in this subchapter—

* * *

(6) The term “commerce” means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or

any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * *

Title 29, U.S.C.A. §157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, §101, 61 Stat. 140.

Title 29, U.S.C.A. §158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this sub-chapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 158 (a) of this title as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 159 (e) of this title the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (a) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (b) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

Title 29, U.S.C.A. §185. Suits by and against labor organizations—Venue, amount, and citizenship.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

APPENDIX B

LIST OF EXHIBITS

<i>Ex. No.</i>	<i>Identified</i>	<i>Offered</i>	<i>Admitted</i>	<i>Rejected</i>	<i>Other</i>
1					
2	76		50		
3	48	48	48		
4	4	4		4	
5	62 & 64		64		
6	63		63		
7	63		64		
8	63		63		
9	63		63		
10	64		64		
11	65		65		
12	65		65		
13	65	65	65		
14	71		76		
15	85	85	85		
16	85	85	85		
17	85	85	85		
18	85	85	85		
19	85	85	85		
20	85	86	86		
21	86	86	86		
22	86				
23	86	86	86		
24					
25	86	86			
26	85	85	85		
27	86	86	86	Withdrawn—	86
28	85	85	85		
29	84	84	84		
31	84	84	84		
32	84	84	84		
33	84	84	84		
34	84	84	84		
35	84	84		84	
36	84	84	84		
37					
38					

<i>Ex. No.</i>	<i>Identified</i>	<i>Offered</i>	<i>Admitted</i>	<i>Rejected</i>	<i>Other</i>
39	84	84	84		
40	83	83	83		
41	83	83	83		
42	83	83	83		
43	92	92	92		
44	122	122	122		
45					
46					
47					
48	95	95	95		
49	95	95	95		
50	97	97	97		
52	98	98			Withdrawn—98
53	100	100	100		
54	101	102	102		
55	102	102	102		
56	103	103			
57	107	107	107		
58	115	115	115		
59	118	118	118		
60	118	118	118		
61	136				
62	136				
63	136				
64					
65	137				
66	137				
67	137				
68	137				
69	137				
70	137				
71	137				
72	137				
73	137				Withdrawn—103

Explanatory Note: Since the testimony of the witnesses was abstracted and certain portions omitted as not germane to the appeal, the printed transcript is not complete as to exhibits. Appellant makes no assignment of error on the admission or rejection of exhibits.

No. 15,733

IN THE

United States Court of Appeals
For the Ninth Circuit

RICHARD EDGAR LEWIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE.

WILLIAM T. PLUMMER,

United States Attorney,

Anchorage, Alaska,

Attorney for Appellee.

FILED

MAR 7 1958

PAUL P. O'BRIEN, CLERK



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No. 15,733

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RICHARD EDGAR LEWIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE.

JURISDICTIONAL STATEMENT.

On August 15, 1957, the United States District Court for the District of Alaska, Third Judicial Division thereof, denied Appellant's Motion to Vacate and Set Aside the Sentence under which he is presently incarcerated in the United States Penitentiary, McNeil Island, Steilacoom, Washington.

From the denial of such motion (which was founded on Title 28, Section 2255, United States Code) the instant appeal is being prosecuted by the Appellant.

Jurisdiction below was conferred by 48 U.S.C. 101. Jurisdiction in this Court is conferred by 28 U.S.C. 1291, 2253 and 2255.

STATEMENT OF FACTS.

Since the sole issue presented by the instant appeal is a question of law, it is not believed to be necessary to set forth or elucidate any facts.

The only facts which this Honorable Court needs to be familiar with, it is believed, in order to decide this appeal are juridical facts and consists of the content of Appellant's Motion to Set Aside the Sentence and the judgment of the trial Court denying same.

For the purpose, however, of making it unnecessary for the Court to advert to the appeal documents, it will probably be desirable here to mention that the Appellant stands imprisoned at the present time for a conviction under Count II of a consolidated Indictment, said Count II charging a violation of Section 40-3-2, ACLA, 1949 (possession of narcotics May 26, 1951); and stands sentenced to consecutive imprisonments under a conviction of Counts III and IV of the same consolidated Indictment, Count III being laid under Title 26, Section 2553, United States Code (purchase, sale, dispensing and distributing narcotics not in the original stamped package and not from an original stamped package); and Count IV being laid as a violation of Title 26, Section 2593 United States Code (being a transferee of narcotics and required to pay a transfer tax thereupon, but not having paid such tax).

The District Court case numbers under which these Indictments were returned by the grand jury and tried

in the trial Court are Criminal Nos. 2551, 2555 and 2575.

The Court will notice that Count I was not listed or adverted to. This is so because of the fact that your Honorable Court vacated the original Count I. This decision was rendered by your Court in No. 14,871 Edgar Richard Lewis, Appellant, vs. United States of America, Appellee, on June 25, 1956. Count I of the original consolidated Indictment therefore disappeared and in the trial Court mandate proceedings were accomplished and there was adjustment of the Appellant's prisoner's term in accordance therewith.

The Court's attention is attracted to the fact that when your Court vacated the sentence imposed under Count I it expressly "affirmed as to Counts II, III and IV". See last sentence of the opinion handed down in the case referred to, to-wit: No. 14,871 dated June 25, 1956.

One more word of explanation is believed to be necessary. The Court's attention is invited to the fact that the date of the crime involved in Count II is shown by that count to be May 26, 1951, whereas the date of the two crimes which are the subject of Count III and Count IV, respectively, is shown by the last two named counts to be April 7, 1951.

It will be noted by the Court that the Appellant's Statement of Points to be urged on appeal contains an attack only on Counts III and IV, and the gist of the attack is that Counts III and IV state the same

offense and the sentences imposed thereon are therefore invalid.

ARGUMENT.

Appellee believes it to be quixotic and supererogatory to cite authorities on a proposition of law so palpably plain as this one. The whole gist of this appeal and Appellant's attack on the denial of his Motion to Vacate under 2255 is that Counts III and IV set forth the same offense. A mere inspection of those two counts shows that they are intrinsically distinct and different. This Honorable Court, of course, needs no citation of authorities for the proposition that one transaction can give rise to a multiplicity of crimes. No authority will therefore be cited for that elementary and universally acknowledged proposition.

Since one transaction may give rise to one or more crimes and since the crimes set forth in Counts III and IV are different, and their difference can be determined merely by visual inspection, the Appellee concludes, without further argument, that the Appellant does not stand, on that point, at least, invalidly sentenced and imprisoned; and he urges no other points in his appeal.

CONCLUSION.

Since the Appellant cannot be sustained on the sole attack which he makes, it follows that the judgment of the trial Court denying Appellant's motion under 2255 should be affirmed.

Dated, Anchorage, Alaska,
March 3, 1958.

Respectfully submitted,

WILLIAM T. PLUMMER,

United States Attorney,

Attorney for Appellee.

15734

No. ~~20050~~.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMBROSE BADILLO CAUDILLO, JOE ROMERO,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF OF APPELLEE UNITED STATES OF
AMERICA.

LAUGHLIN E. WATERS,
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FILED

JAN 4 1958

PAUL P. GERTEN, CLERK

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No. 26053.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

AMBROSE BADILLO CAUDILLO, JOE ROMERO,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

**BRIEF OF APPELLEE UNITED STATES OF
AMERICA.**

Basis of Jurisdiction.

This is a criminal action. Jurisdiction of the District Court was invoked under 18 U. S. C. §3231. The subject four-count indictment was returned on July 10, 1957. Defendant Caudillo was charged in counts one, two and three with violating 21 U. S. C. §176(a). Defendant Romero was charged in counts three and four with violating the same statute.

[R. 3*] 21 U. S. C. §176(a) reads as follows:

“Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United

*References to the Transcript of Record will be prefixed with the letter “R.” References to the Reporter’s Transcript of Proceedings will be prefixed with the letters “Tr.”

States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

“Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

“As used in this subsection, the term ‘marihuana’ has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

“For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.”

On July 16, 1957, each of the defendants pleaded not guilty to all of the respective counts of the indictment in which he was charged [Tr. 8]. After a jury trial defendant Caudillo was adjudged guilty on Counts One, Two and Three of the indictment and was sentenced to imprison-

ment for a period of five years on Count One, a further period of five years on Count Two consecutive with the sentence imposed in Count One, and a further period of five years on Count Three to be served concurrently with the sentence imposed on Counts One and Two. Defendant Romero was adjudged guilty on Counts Three and Four and was sentenced to imprisonment for a period of five years on Count Three, and a further period of five years on Count Four consecutive with the sentence imposed in Count Three. Judgment was entered on August 19, 1957 [R. 7-8]. Notice of Appeal was filed by each defendant on August 30, 1957 [R. 14]. This Court has jurisdiction under Title 28, U. S. Code, Section 1291.

Statement of the Case.

Indictment. The indictment is in four counts which charge as follows:

COUNT ONE: On or about June 12, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Ambrose Badillo Caudillo, with intent to defraud the United States and after importation, did knowingly and unlawfully sell and facilitate the sale of approximately 2 pounds of bulk marihuana to Paul Gutierrez, which said marihuana, as the defendant then and there well knew, had been imported into the United States contrary to law.

COUNT TWO: On or about June 17, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Ambrose Badillo Caudillo, with intent to defraud the United States and after importation, did know-

ingly and unlawfully sell and facilitate the sale of approximately 2 pounds of bulk marihuana to Paul Gutierrez, which said marihuana, as the defendant then and there well knew, had been imported into the United States contrary to law.

COUNT THREE: On or about June 24, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Ambrose Badillo Caudillo and Joe Romero, with intent to defraud the United States, did knowingly receive, conceal, and facilitate the transportation and concealment of certain merchandise, namely: approximately 2 pounds of bulk marihuana, which said merchandise, as the defendants then and there well knew, theretofore had been imported and brought into the United States contrary to law.

COUNT FOUR: On or about June 24, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Joe Romero, with intent to defraud the United States, did knowingly, receive, conceal, and facilitate the transportation and concealment of certain merchandise, namely: approximately 4 ounces of bulk marihuana, which said merchandise, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to law.

Evidence. The evidence adduced at the trial showed the following:

(1) With regard to Count One, that on June 12, 1957, defendant Caudillo sold to Los Angeles Deputy Sheriff Paul Gutierrez approximately 2 pounds of bulk marihuana for the sum of \$150.00. The sale took place in the vicinity

of the intersection of 3rd and Eastman Streets, Los Angeles, California.

(2) With regard to Count Two that on June 17, 1957, defendant Caudillo sold to Deputy Sheriff Paul Gutierrez approximately 2 pounds of bulk marihuana for the sum of \$150.00. The sale took place in the "400" block No. Dangler St., Los Angeles, California.

(3) With regard to Count Three that on June 24, 1957, in the "400" block, No. Dangler Street, Los Angeles, California defendant Caudillo again met with Deputy Sheriff Paul Gutierrez and agreed to sell approximately 2 pounds of bulk marihuana to him. Defendant Caudillo was then paid for the marihuana and promised delivery thereof later that night at the same location. After that conversation took place, defendant Caudillo left the location by automobile, being followed by several other members of the Los Angeles County Sheriff's Office. Shortly thereafter, defendant Caudillo picked up defendant Romero and proceeded by automobile to a location on Raynol Street, Los Angeles, where they met two other men, one with a duffle bag and one carrying a shopping bag. The man carrying the shopping bag removed two small brown paper bags therefrom and handed them to defendant Romero. Defendant Romero was then seen placing the two brown paper bags in the trunk of the car in which he and defendant Caudillo were riding. Both defendants then proceeded in the automobile to the vicinity of Esmeraldo and Huntington Streets, Los Angeles where they were intercepted and placed under arrest. During a search incident

to the arrest the aforementioned two brown paper bags were retrieved from the trunk of the automobile in which defendants Caudillo and Romero were riding. Each bag was found to contain approximately one pound of bulk marihuana.

(4) With regard to Count Four, at the time of the above mentioned arrest Romero voluntarily disclosed to the arresting officers the fact that he had a small supply of marihuana at his residence. The following morning, three members of the Los Angeles County Sheriff's Office proceeded with defendant Romero to his residence, 402 S. Fetterley Street, Los Angeles, where defendant Romero invited them to enter, whereupon he retrieved from a shelf in a bedroom closet in the presence of the accompanying officers, three small paper bags containing approximately 4 ounces of bulk marihuana which he surrendered to the officers.

Relative to the geographical origin of the marihuana involved herein, Mr. Beckner, Narcotic Inspector for the State of California, upon inspection of a portion of the subject marihuana [Ex. 3-B], testified that it appeared to be what he described as the "tops" of the plant [Tr. 223]. He then examined another portion of the subject marihuana [Ex. 4-B] and stated that it contained a "flowering top" [Tr. 224].

Mr. Beckner also testified that during the last 20 years the growth of marihuana has declined throughout California [Tr. 226, 277]; that marihuana plants grown in California are usually stripped before they reach maturity

[Tr. 228]; that huge quantities of marihuana are grown in Mexico [Tr. 231]; that the “flowering top” ordinarily appears only in mature plants [Tr. 240]; that a marihuana plant which has grown to maturity is rarely encountered in California [Tr. 240].

At the conclusion of the testimony, the court instructed the jury, *inter alia* [Tr. 380-381].

“The marihuana must be proved beyond a reasonable doubt and to a moral certainty to have been imported or brought into the United States contrary to law and it must be so proved that each defendant knew that as to the marihuana involved in the respective counts concerning each defendant.”

“In this connection, Section 176(a) of Title 21 of the United States Code has the following to say:

“‘Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.’

“The statute just read does not change the fundamental rule and was not intended to change the fundamental rule that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. Nor does it impose a defendant the burden of producing proof that the marihuana was unlawfully imported, or any other evidence. For that matter, as previously stated, the burden is also on the prosecution to prove guilt beyond a reasonable doubt.

“What this statute does do is to create an inference in favor of the United States. If you, the jury,

should find from the evidence beyond a reasonable doubt and to a moral certainty that there was possession, as that term will be defined to you on the part of the defendant as to the respective count in which he might be charged, such possession permits, but does not compel, you to draw the inference that the marihuana was imported or brought into the United States contrary to law and that such defendant knew it.

“As against that inference there is a possible contrary inference that the marihuana was not imported contrary to law which you may reach from a consideration of the whole evidence, including the evidence that marihuana grows in this country and elsewhere in California and the southwestern states of the United States and all of the other evidence relating to its growth.”

Questions Presented.

- (1) Is the statutory presumption relative to the origin of the marihuana constitutional?
- (2) Was the presumption rebutted by other evidence to the contrary?

ARGUMENT.

The Validity of a Statutory Presumption Depends Upon Whether There Is a Rational Connection Between the Fact Presumed and the Fact to Be Proved.

In *Mobile, J. & K. C. R. R. v. Turnipseed*, 219 U. S. 35, the constitutionality of Section 1985 of the Mississippi Code of 1906 was attacked. That section reads as follows:

“Injury to Persons or Property by railroads *prima facie* evidence of Want of Skill, etc.,—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotive or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies.”

In upholding the validity of the foregoing presumption the Supreme Court said in the *Mobile* case, at page 42:

“The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable and the strength of any inference of one fact from proof of another depends upon the generality of experience upon which it is founded.

“Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence and quite within the general power of government. Statutes National and state, dealing with such methods of proof both civil and criminal cases abound, and the decisions upholding them are numerous.”

On page 43 of the *Mobile* case the Supreme Court goes on to state:

“That a legislative presumption of one fact from another may not constitute denial of due process of law or denial of the equal protection of the law it is *only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed and that the inference of one fact from proof of another shall not be so unreasonable as to be purely arbitrary mandate.* . . .

“If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.” (Emphasis added.)

Other cases of like import are:

Luria v. United States, 231 U. S. 9, 26;

Fong Yue Ting v. United States, 149 U. S. 698, 729;

Adams v. New York, 192 U. S. 585, 599;

Bailey v. Alabama, 219 U. S. 219;

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 81;

Reitler v. Harris, 223 U. S. 437, 441.

The Court of Appeals for the 9th Circuit had occasion to pass upon the question of the validity of a statutory presumption in *Casey v. United States*, 20 F. 2d 752. That case involved the validity of a presumption contained in §1 of the act of December 17, 1914, which made the purchase of opium and derivatives unlawful except in and

from the original package and the absence of the required stamps was deemed to be *prima facie* evidence of a violation of that section by the person in whose possession the opium is found. The defendant in the *Casey* case was convicted of the possession of 3 and 4/10 grains of morphine not in or from the original stamped package. The Court of Appeals upheld the conviction and the validity of the aforesaid statutory presumption. The case was appealed to the United States Supreme Court which upheld the conviction.

Casey v. United States, 276 U. S. 413.

The Supreme Court, speaking through Mr. Justice Holmes, said at page 418:

“With regard to the presumption of purchase of a thing manifestly not produced by the possessor, there is a ‘rational connection between the fact proved and the ultimate fact presumed.’ *Luria v. United States*, 231 U. S. 9, 25; *Yee Hem v. United States*, 268 U. S. 178, 183. Furthermore, there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. *Greer v. United States*, 245 U. S. 559. The statute here talks of *prima facie* evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence Section 2494. It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government. 4 Wigmore, Evidence Section 2486.”

The holding of the Supreme Court in the *Casey* case is that if a presumption is a rebuttable one as distinguished

from a conclusive presumption it does not constitute a denial of due process since it is not conclusive of the rights of the person against whom it is raised.

Section 176(a) under which defendants Caudillo and Romero were convicted was enacted as part of the Marihuana Control Act of 1956 (Public Law 728), on July 18, 1956. Prior to the enactment of the Marihuana Control Act of 1956, hearings on the narcotics problem were held throughout the Country by the Senate Judiciary Subcommittee on Improvements in the Federal Criminal Code. Such hearings were held in Los Angeles on November 14-18, 1955. During those hearings testimony was taken and reports were submitted by many leading authorities in the field of narcotic enforcement and control a full report of the hearings held in Los Angeles is contained in "Hearings Held in Los Angeles Before the Subcommittee on Improvements in the Federal Criminal Code of the Committee on the Judiciary, United States Senate, November 14-18, 1955."

On page 4125 thereof the report states, "The chief source of marihuana for the illicit market is outside the United States, allegedly in Mexico."

Attached to said report as Exhibit 7 is a dissertation entitled "Narcotics, Their Legitimate and Illicit Use," by Walter R. Creighton, Chief, Bureau of Narcotic Enforcement, Department of Justice, State of California.

On page 4167, Mr. Creighton states:

"A considerable amount of marihuana is continuously being smuggled into this country from Mexico—in fact the bulk of the marihuana seizures by the United States Customs has been on the Mexican border where there has been a continuous stream of the drug, both in bulk and in cigarettes from various localities south of the border."

The findings of the Senate Subcommittee show the rational basis for the presumption of importation of marihuana into the United States. The trial judge in the subject case specifically instructed the jury that the possession of marihuana by the defendants "*permits, but does not compel*, you to draw the inference that the marihuana was imported or brought into the United States contrary to law and that such defendant knew it" [Tr. 381; emphasis added]. The Supreme Court held in *Mobile, J. & K. C. R. R. v. Turnipseed, supra*, that such a rebuttable presumption constitutes but a rule of evidence and as such in no wise deprives the defendant of due process of law. As the Supreme Court pointed out in the *Mobile* case, on page 43:

"If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either Criminal or Civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

Such opportunity was afforded to the defendants in the present case and witnesses were in fact called in their behalf relative to the question of importation. The jury considered all the evidence and decided against the defendants.

It is submitted that the evidence offered by the defendants showed that the subject marihuana in all probability was imported into California, rather than to the contrary. This is shown by the testimony of defendants' witness, Mr. Beckner, Narcotic Inspector for the State of California, that the subject marihuana contained a "flowering top" [Tr. 224]; that the "flowering top" ordinarily ap-

pears only in mature plants [Tr. 240]; and that a marihuana plant which has grown to maturity is rarely encountered in California [Tr. 240].

Conclusion.

The subject presumption, as shown by the testimony during the trial herein and the findings of the Senate Judiciary Subcommittee, is clearly not arbitrary. Such presumption, being rebuttable, constitutes but a rule of evidence and does not deprive a defendant of due process of law. Evidence relative to the source of the subject marihuana was introduced by the defendants. The jury was carefully instructed that possession of marihuana by the defendants *permitted*, but did not *compel* it to draw the inference that the marihuana was imported contrary to law and that defendants knew it. The jury was further instructed that in reaching its decision it must consider all the evidence in the case. We must assume that it did so.

There is no basis for the defendants' claim that they have been deprived of due process of law, and the judgment of the trial court must, therefore, stand.

Respectfully submitted,

LAUGHLIN E. WATERS,

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No. 15736

United States
Court of Appeals
for the Ninth Circuit

HERRING MAGIC, a corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

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PAUL P. GIBBEN, CLERK

No. 15736

United States
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HERRING MAGIC, a corporation, Appellant,

vs.

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Northern Division

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In the District Court of the United States Western
District of Washington, Northern Division

No. 4282

HERRING MAGIC, a Washington corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

For its cause of action plaintiff alleges:

I.

This is an action brought against the United States of America under the laws of the United States for the recovery of a manufacturers excise tax on sporting goods for the period of April 1, 1955, to December 31, 1955, erroneously assessed against and collected from plaintiff by William E. Frank, District Director of Internal Revenue for the District of Washington, at Seattle, hereafter called the District Director.

2.

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

3.

Plaintiff manufactures and sells a device known by its trade name of "Herring Magic". This device

is used by fishermen to hold a minnow on the end of a fish line. Because of the shape of the device when pulled through the water the minnow moves and appears to swim, so that it is a more attractive bait for fish.

4.

The District Director of Internal Revenue at Seattle informed plaintiff that Herring Magic was subject to tax under the provisions of Section 4161 of the Internal Revenue Code of 1954. Upon the erroneous demand of the District Director at Seattle, Washington, under protest, plaintiff filed quarterly excise tax returns, Form 720, for the period from April 1, 1955, to December 31, 1955, and under protest paid taxes erroneously claimed, in the total amount of \$2,323.35, as follows:

September 9, 1955.....	\$567.72
September 22, 1955.....	580.89
October 3, 1955.....	814.16
November 3, 1955.....	343.03
January 20, 1956	17.55

5.

On or about January 18, 1956, within the time and in the form and manner required by law, plaintiff duly filed with the District Director its claim for refund of these excise taxes paid as aforementioned in the sum of \$2,323.35. The claim set forth the grounds on which refund should be allowed. A true copy of this claim is attached hereto, marked Exhibit "A", and by this reference made a part hereof as if fully set forth.

6.

By letter, received by attorneys for plaintiff on November 8, 1956, numbered #33295 on form FL-214, and sent by registered mail, the District Director disallowed in full the claim of plaintiff and no part of plaintiff's claim for refund has been paid or refunded since that time.

7.

The aforementioned manufacturers excise tax was wrongfully and unlawfully assessed against and paid by plaintiff. The device, "Herring Magic", is not within the purview of any of the articles described in Section 4161 of the Internal Revenue Code of 1954.

8.

By reason of the foregoing, plaintiff has been erroneously assessed and has erroneously paid tax for the period of April 1, 1955, to December 31, 1955, in the amount of \$2,323.35. This sum should be refunded to it by defendant, The United States of America, together with interest at six percent per annum from the date of each payment of tax until plaintiff is repaid.

Wherefore, plaintiff, Herring Magic, Inc., prays for judgment in its favor against defendant, The United States of America, on its cause of action in the sum of \$2,323.35, together with interest at the rate of six percent per annum from the dates paid until repaid, for its costs and expenses herein in-

manufacturers' excise taxes assessed for the calendar quarters of April, May and June, and July, August and September of 1955. Taxpayer now claims a refund of these payments with interest from the dates of payment.

Taxpayer manufactures a product known as "Herring Magic". This product is patented under United States patent numbers 2461755 and D 155307. A sample of this product is enclosed. Herring Magic is manufactured in a series of sizes beginning with No. 1 and running through No. 4. The size used depends upon the size of the fish sought. The product consists of a piece of plastic shaped to actuate the bait or lure to be attached, an eye for attaching the fishing line, a clip to attach the bait or lure and two or three hooks attached by a strong line to a piece of plastic.

From examination of the sample, it is obvious that Herring Magic alone will not attract or lure any fish. The lure or bait which usually consists of a dead herring or minnow must be fastened to the plastic actuator by a safety pin attachment. When the bait or lure is so attached, the Herring Magic then is trailed through the water at the end of the fishing line. The plastic activator, because of its curvature, will move the trailing bait or lure through the water in a manner similar to a live but wounded herring or minnow.

The box in which Herring Magic is sold has on the top — "Herring Magic Trade Mark — Works Miracles with Minnows." On the sides and bottoms

the following information is given: "The Frantic Swimming Actionizer—Better Than Live Minnows at Their Best—True 'Crippled Minnow' Swimming Action—It's 'Red Hot' Wherever Big Fish Eat Little Ones—Herring Magic No. 1—\$1.75".

As is readily apparent, without attaching a bait or lure to Herring Magic, it would be impossible for Herring Magic to attract or catch any fish. So it would be useless as a fishing device. Herring Magic, as manufactured and sold by taxpayer without the attachment of bait or lure would be comparable to a hook without the worm—no lure, so no fish.

Section 4161 of Chapter 32—"Manufacturers' Excise Taxes" of the Internal Revenue Code of 1954 had its origin in Sec. 3406 of the old internal revenue code. This section, upon which taxpayer's taxes were assessed and on which taxpayer now claims a refund, states in part:

"Code Sec. 4161. Imposition of Tax.

"There is hereby imposed upon the sale by the manufacturer, producer or importer of the following articles (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) a tax equivalent to 10% of the price for which so sold: . . .

"Fishing rods, creels, reels and artificial lures, baits and flies . . ."

The only article enumerated in sec. 4161 which could include Herring Magic must result in a manufacturers' excise tax being assessed upon the manu-

facturer in the sale of Herring Magic is "artificial lures".

Webster's New International Dictionary Second Edition Unabridged of 1947 finds "artificial" as made or contrived by art; produced or modified by human skill and labor, often as an imitation of something found in nature;—opposed to natural; as artificial heat or light, gems, salts, minerals, fountains, flowers, breeding . . . feigned, fictitious; assumed, not genuine." It defines "lure" as "A contrivance somewhat resembling a bird, made of a bunch of feathers attached to a long cord and often baited with raw meat,—used by falconers in recalling hawks . . . That which invites by the prospect of advantage or pleasure; an allurement; enticement . . . A decoy or bait for fish or animals, specif., a tassellike structure on the head of pediculate fishes." The verb "lure" is defined as "to draw to the lure, hence to allure or invite by means of anything that promises pleasure or advantage; to entice."

It might be argued that Herring Magic is made or contrived by art. But certainly it is not an imitation of something found in nature; opposed to natural; or feigned, fictitious assumed or not genuine. If Herring Magic is considered artificial under this definition, then everything known to man would be artificial.

Even if Herring Magic might be considered artificial, it could not possibly be defined as a lure by any definition of this word. Herring Magic alone

would not invite, allure, entice, decoy or otherwise attract any fish. In fact, without the attached bait, it is the antithesis of the word "lure" and would in effect repel or scare away any fish that might see it passing through the water.

There appear to be no regulations, cases or authorities defining artificial lure. A letter mailed by the Treasury Department under date April 7, 1947, Ref. MT:ST:MMP, C 1 S-114856, addressed to Ernest Milholland and Kendon K. Smith, dba Evans Manufacturing Co., 76 University Street, Seattle 1, Washington, states in part:

"The term 'artificial lures' as set forth in section 3406 (a) (1) of the Code includes spoons, spinners and other bright metals used to attract fish to artificial bait as well as articles such as imitation mice, insects, minnows, etc., with or without hooks attached thereto, for use with or without bait.

"Trolling spoons, with or without hooks, are considered to be taxable artificial lures and the bureau is without authority to grant a refund of the tax on the manufacturer's sales of such trolling spoons on the grounds that the spoons are sold for use by commercial fishermen * * *"

In this letter it appears that the Treasury Department has followed Webster's definition of "artificial lure" and held taxable any lures that attract fish through artificial bait as well as articles such as imitation mice, insects and minnows.

Herring Magic does not attract fish and certainly

cannot be considered as an imitation mouse, insect, minnow or any other bait. Its only purpose is to hold a real herring. In itself it is not a lure and would attract nothing.

Thus it is respectfully submitted that Herring Magic is not an artificial lure within the intent and definition of this word as used in sec. 4161 of the Internal Revenue Code of 1954 and therefore is not taxable under the manufacturers' excise tax, and this claim for refund should be allowed.

[Endorsed]: Filed Dec. 6, 1956.

[Title of District Court and Cause.]

ANSWER

The defendant, United States of America, by its attorney, Charles P. Moriarty, United States Attorney for the Western District of Washington, in answer to plaintiff's complaint, admits, denies and alleges as follows:

1. Admits the allegations of paragraph 1 of the complaint, except it is denied that any taxes were erroneously assessed or collected from the plaintiff.

2. Admits the allegations of paragraph 2 of the complaint.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint, except defendant admits that plaintiff

manufactures and sells a device known by its trade name of "Herring Magic."

4. Denies the allegations of paragraph 4 of the complaint, except it is admitted that plaintiff was informed that it was subject to tax under the provisions of Section 4161 of the Internal Revenue Code of 1954 and that plaintiff filed returns and paid the following amounts on the dates indicated:

September 12, 1955	\$ 567.72
November 8, 1955	1,738.08
January 20, 1956	17.85

5. Denies the allegations of paragraph 5 of the complaint, except it is admitted that Exhibit "A" attached to the complaint is a copy of a claim for refund filed by plaintiff on January 22, 1956, for the refund of \$2,323.35. Unless otherwise expressly admitted herein, each and every allegation contained in Exhibit "A" is denied.

6. Admits the allegations of paragraph 6 of the complaint.

7. Denies the allegations of paragraph 7 of the complaint.

8. Denies the allegations of paragraph 8 of the complaint.

Affirmative Defense

For its affirmative defense to plaintiff's complaint, defendant alleges:

I.

Upon information and belief, the plaintiff has not borne the economic burden of the tax of which it complains, but has included the tax in the sales price of the article sold.

II.

Upon information and belief, plaintiff has not repaid nor has it agreed to repay the tax to the ultimate purchaser of the article.

III.

Upon information and belief, plaintiff has not filed with the Secretary of the Treasury, or his delegate, the written consent of the ultimate purchasers of the article to the allowance of a refund to plaintiff.

IV.

Plaintiff has not complied with the requirements of Section 6416(a) of the Internal Revenue Code of 1954.

Wherefore, defendant prays for judgment in its favor, dismissal of plaintiff's complaint, for costs and such other relief as this Court deems proper.

/s/ CHARLES P. MORIARTY,
United States Attorney.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 4, 1957.

[Title of District Court and Cause.]

COURT'S ORAL OPINION

Tuesday, September 3, 1957.

Before Judge Bowen.

The Court: From a preponderance of the evidence the Court finds, concludes and decides as follows:

That the completed functioning lure in question here includes not only the device described in Plaintiff's Exhibit 1, but also the bait which it is hoped the lured fish will take. The completed functional thing, therefore, is that thing which, when cast into the water, serves to attract or allure the desired fish onto the hook. But the inanimate bait would not be activated so as to attract and allure the intended catch onto the hook in this instance without the work of plaintiff's actionizer. It is the thing which through manufacturing design artificially activates the inanimate bait as the result of the passing of the water over that thing's irregular surfaces, by which action of which thing the intended catch is lured onto that thing's hook. That device is the "artificial lure" taxed by the statute.

Therefore, it seems clear to the Court upon the evidence submitted during this trial the tax collector for the Government is correct in holding that this is an artificial lure subject to the tax, and that plaintiff is not entitled to recover in this action and that the plaintiff should take nothing by his complaint herein.

[Endorsed]: Filed Sept. 6, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the Court at Seattle, Washington, on September 3, 1957. Plaintiff appeared by Garvin, Ashley & Foster, and was represented in court by Thomas B. Foster and Daniel J. Riviera; and the defendant appeared by Charles P. Moriarty, United States Attorney for the Western District of Washington, and was represented in court by Allen A. Bowden, Attorney, Department of Justice, and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service.

The Court, having considered the Trial Stipulation, the evidence and exhibits introduced by the parties, and the arguments and briefs of counsel, and being fully advised in the premises, and having heretofore rendered an oral opinion, now finds the facts herein and states its conclusions of law as follows:

Findings of Fact

1. This is an action brought against the United States of America under the laws of the United States for the recovery of a manufacturers excise tax on sporting goods for the period of April 1, 1955, to December 31, 1955, assessed against and collected from plaintiff by William E. Frank, District Director of Internal Revenue for the District of Washington, at Seattle, hereafter called the District Director.

2. Myron C. Miller made application for a patent on the device hereinafter referred to on August 9, 1944. The patent based on the application was granted on February 15, 1949, as United States Patent No. 2461755. No application for or further patent has been granted to Myron C. Miller in connection with the device in question.

3. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the state of Washington. Plaintiff was incorporated on April 16, 1954. Myron C. Miller at all times mentioned herein has been and now is the majority stockholder of plaintiff.

4. Plaintiff commenced manufacturing a device known as Herring Magic on or about January 1, 1955, and commenced selling the device on or about March 7, 1955. This device is the subject of the patent mentioned above.

5. Various sizes of the device were sold by plaintiff to jobbers, wholesalers and retailers at prices ranging from \$0.7875 to \$0.99 commencing March 7, 1955. This price structure has remained unchanged to and including all times relative to this suit.

6. On or about May 1, 1955, Myron C. Miller, acting for plaintiff, made oral inquiry at the Seattle office of the District Director as to whether a manufacturers excise tax was applicable to the sale of the device here in question. As a result of this inquiry the District Director's office notified

the plaintiff on June 8, 1955, that the device was subject to the manufacturers excise tax imposed by Section 4161 of the Internal Revenue Code of 1954.

7. Thereafter, plaintiff filed quarterly excise tax returns, Form 720, for the period from April 1, 1955, to December 31, 1955, and paid the following taxes on the dates and in the amounts as follows:

September 12, 1955	\$ 567.72
November 8, 1955	1,738.08
January 20, 1956	17.55

8. On or about January 18, 1956, within the time and in the form and manner required by law, plaintiff filed with the District Director its claim for refund of the excise taxes paid as aforementioned in the sum of \$2,323.35.

9. By registered letter, received by attorneys for plaintiff on November 8, 1956, the District Director disallowed in full the claim for refund. No part of plaintiff's claim for refund has been paid or refunded since that time.

10. The plaintiff has borne the economic burden of the taxes for which it seeks refund and has complied with the provisions of Section 6416(a) of the Internal Revenue Code of 1954.

11. The device herein referred to in paragraph 2, above, known by its trade name of "Herring Magic," is an "artificial lure," and the transcript and factual statements of this Court's Oral Opinion and Decision announced September 3, 1957 herein, and the whole thereof, are hereby incorporated here as a part of these findings.

Conclusions of Law

I.

The Court has jurisdiction of the parties and subject matter of this action.

II.

The plaintiff's device, patented and sold as set forth in the above findings, is an "artificial lure" within the purview of Section 4161 of the Internal Revenue Code of 1954.

III.

The manufacturers excise tax imposed by Section 4161 of the Internal Revenue Code of 1954 on the device, as so manufactured and sold, was legally imposed and collected from plaintiff, and judgment should be entered for the defendant and for costs to be fixed by the Clerk.

Done In Open Court this 6th day of September, 1957.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ ALLEN A. BOWDEN,

/s/ THOMAS R. WINTER,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 6, 1957.

In The United States District Court, Western
District of Washington, Northern Division

Civil Action No. 4282

HERRING MAGIC, a Washington Corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This case came on for trial before the Court at Seattle, Washington, on September 3, 1957. Plaintiff appeared by Garvin, Ashley & Foster, and was represented in court by Thomas B. Foster and Daniel J. Riviera; and the defendant appeared by Charles P. Moriarty, United States Attorney for the Western District of Washington, and was represented in court by Allen A. Bowden, Attorney, Department of Justice, and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service.

The Court, having considered the Trial Stipulation, the evidence and exhibits introduced by the parties, and the arguments and briefs of counsel, and being fully advised in the premises, and having heretofore rendered an oral opinion, and the Court having entered its Findings of Fact and Conclusions of Law herein, it is in conformity therewith

Ordered, Adjudged and Decreed that plaintiff

take nothing from this action, and its complaint be dismissed with prejudice, and that judgment be entered for the defendant herein and for its costs to be taxed by the Clerk.

Done In Open Court this 6th day of September, 1957.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ ALLEN A. BOWDEN,
/s/ THOMAS R. WINTER,
Attorneys for Defendant.

[Endorsed]: Filed and Entered Sept. 6, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Herring Magic, Inc., the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on September 6, 1957.

GARVIN, ASHLEY & FOSTER,
Attorneys for Plaintiff.

[Endorsed]: Filed Sept 16, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

The undersigned plaintiff hereby deposits with the clerk of the above entitled court the sum of two hundred fifty dollars (\$250) in cash as its bond for costs on appeal and acknowledges that it and its successors in interest are bound to pay to the United States of America, defendant, the sum of Two hundred fifty dollars (\$250).

The condition of this bond is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed September 16, 1957, from the judgment of this court entered September 6, 1957, if the plaintiff shall pay all costs adjudged against it if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this cash bond shall be due forthwith.

HERRING MAGIC, INC., a

Washington corporation,

/s/ By DANIEL J. RIVIERA,

Of Garvin, Ashley & Foster,

Attorneys for Plaintiff-

Appellant.

Signed and acknowledged before me this 16th day of September, 1957.

[Seal] /s/ LOUIS H. PEPPER,

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Sept. 16, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) FRCP and designation of counsel, I am transmitting herewith the following original documents in the file dealing with the action, together with original exhibits, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed Dec. 6, 1956.
3. Answer of Defendant, filed Feb. 4, 1957.
6. Trial Stipulation, filed Sept. 3, 1957.
7. Court's Oral Opinion, filed Sept. 6, 1957, as transcribed by Court Reporter.
9. Findings of Fact and Conclusions of Law, filed Sept. 6, 1957.
10. Judgment, filed Sept. 6, 1957.
12. Notice of Appeal, filed Sept. 16, 1957.
13. Bond for Costs on Appeal, filed Sept. 16, 1957.
14. Designation of Contents of Record on Appeal, filed Sept. 16, 1957.
17. Order Transmitting original exhibits, filed 9/26/57.

15. Court Reporter's Statement of Facts (Record of Proceedings), filed 9/16/57.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit: Filing Notice of Appeal, \$5.00; and that said amount has been paid to me by the attorneys for Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 4th day of October, 1957.

[Seal] MILLARD P. THOMAS,
 Clerk,
 /s/ By TRUMAN EGGER,
 Chief Deputy.

In the District Court of the United States, Western
District of Washington, Northern Division

No. 4282

HERRING MAGIC, a Washington corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

STATEMENT OF FACTS

Be It Remembered, that the above entitled and numbered cause was heard before the Honorable John C. Bowen, a Judge of the above entitled

Court, beginning Tuesday, September 3, 1957, at 10:00 o'clock a.m.

The plaintiff was represented by Mr. Daniel J. Riviera and Mr. Thomas B. Foster, of Messrs. Tanner, Garvin & Ashley, Attorneys at Law.

The defendant was represented by Mr. Allen A. Bowden, Attorney, Department of Justice, and Mr. Thomas R. Winter, Special Assistant to Regional Counsel, Treasury Department. [1]*

Whereupon, the following proceedings were had and done, to wit:

The Court: In the case on Trial, Herring Magic, a corporation, versus the United States, plaintiff's Counsel at this time may make an opening statement of what plaintiff thinks the proof will be in this case. Make it in a brief narrative form, please, Mr. Riviera.

Mr. Riviera: Yes, I will, your Honor.

(Thereupon, Mr. Riviera made an opening statement to the Court in behalf of plaintiff.)

The Court: The respondent may at this time or later if it chooses at a proper stage make the defendant's opening statement.

(Thereupon, Mr. Bowden made an opening statement to the Court in behalf of defendant.)

The Court: Call the plaintiff's first witness or let the plaintiff otherwise proceed with the plaintiff's case in chief.

Mr. Riviera: I should like to make one correc-

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

tion in Mr. Bowden's statement. He referred to the year 1949, I believe, as the time when an inquiry was made by the plaintiff. I believe the correct year is 1955. Is that correct, Mr. Bowden?

Mr. Bowden: Yes, your Honor, I'm sorry, I [2] misspoke myself.

The Court: For what year or years is this action contending as to the alleged tax?

Mr. Riviera: It covers the period from April, 1955, to December 31, 1955.

The Court: Repeat the years only. April what?

Mr. Riviera: April, 1955, through December of 1955.

The Court: You may proceed.

Mr. Riviera: The plaintiff calls as its first witness Mr. Myron Miller.

MYRON CHARLES MILLER

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Riviera): Will you state your full name, sir? A. Myron Charles Miller.

Q. And where do you live at the present time?

A. At 4010 36th Avenue West, Seattle, Washington.

Q. What is your present occupation, Mr. Miller?

A. Manufacturing Herring Magics.

Q. How long have you been in the manufacturing business of the article which you have just described? [3] A. 1950.

(Testimony of Myron Charles Miller.)

Q. Before 1950 what was your occupation?

A. Advertising.

Q. And how long were you in that occupation?

A. 1941.

Q. Are you yourself a fisherman?

A. I consider myself so, yes, sir.

Q. How long have you been following that sport? A. Since about 1917.

Q. Have you done fresh water as well as blue water fishing? A. Yes, sir.

The Court: By "blue water" as being salt or fresh, what do you mean? What do you mean, blue? As distinguished from fresh, you spoke of fresh water, what do you mean by blue water?

A. That would be deep sea, out in the ocean.

The Court: Do you mean salt water, ocean water?

A. Yes, your Honor.

The Court: Proceed.

Mr. Riviera: May I have Plaintiff's Exhibit No. 1 marked for identification?

The Court: That opportunity will now be furnished to Counsel.

The Clerk: Plaintiff's Exhibit No. 1. [4]

(A Herring Magic was marked Plaintiff's Exhibit No. 1 for identification.)

The Court: Incidentally, have you a descriptive name for fresh water? You have spoken of salt water as blue water. Have you a descriptive word relating to color which you apply to fresh water?

(Testimony of Myron Charles Miller.)

A. No, sir, your Honor, except that it's referred to as fresh water.

The Court: You may proceed. I think you better place this in an envelope in view of the fish hook. It will do damage otherwise. Get some kind of an envelope, and be careful to avoid the fish hook.

(The clerk did as directed.)

Q. (By Mr. Riviera): Mr. Miller, do you have Plaintiff's Exhibit 1 before you? A. Yes, sir.

Q. Will you please tell us what Plaintiff's Exhibit 1 is?

A. It's an actionizer for putting live swimming action back in a dead minnow of some kind, herring or otherwise, minnow.

Q. Will you take Plaintiff's Exhibit 1 into your hands and explain how the article is used?

A. The head of the bait minnow goes in here. This pin comes down through the head, locks in here, protects the head against the tearing force of the water as it's [5] drawn through, and this little body clamp retains the hooks at all times near the swimming minnow so that when a fish strikes they get the hooks as well as the minnow. This actionizer remains invisible when it is used in the water. The fish sees nothing but the minnow itself.

Q. Does the object which has been marked as Plaintiff's Exhibit 1, is that object patented?

A. Yes, sir.

Q. Do you know who invented the object?

A. Yes, sir. I invented it myself.

Q. When did you develop Plaintiff's Exhibit 1?

(Testimony of Myron Charles Miller.)

A. The first work on it, sir?

Q. Yes.

A. About 1940 I started experimenting on it.

Q. What were the first such devices made of?

A. I believe the first one was carved out of cedar.

Q. And how long did you work on the development of Plaintiff's Exhibit 1?

A. Well, up to date.

Q. Do you recall when you applied for a patent on Plaintiff's Exhibit No. 1?

A. Yes, sir, 1944.

Q. When was the patent issued to you?

A. In 1949. [6]

Mr. Riviera: If the Court please, may I have Plaintiff's Exhibit No. 2 marked for identification?

The Court: That will be done.

The Clerk: Plaintiff's Exhibit 2.

(A photograph was marked Plaintiff's Exhibit No. 2 for identification.)

The Court: When did you say you applied for the patent?

A. In 1944, sir, your Honor.

Q. (By Mr. Riviera): Mr. Miller, do you have Plaintiff's Exhibit No. 2 before you?

A. Yes, sir.

Q. It is a photograph, is it not?

A. That's right.

Q. Were you present when Plaintiff's Exhibit No. 2 was taken? A. Yes, sir.

Q. Do you know who took the picture?

(Testimony of Myron Charles Miller.)

A. Mr. Stevens, of Webster & Stevens, photographers.

Q. Would you describe Plaintiff's Exhibit No. 2?

A. This is a smelt. It should be a herring but I couldn't get a herring, so I used a smelt for this purpose, and this is inserted in the actionizer the same as——

The Court: The effect of the answer is to get into the record the contents of an exhibit. I [7] prefer you to identify it in the proper way. You may ask him what sort of information it contains or reflects, matters of that sort, without asking questions that will elicit a statement in the record of the contents of something that is not admitted in evidence.

Mr. Riviera: Very well, your Honor.

Q. (By Mr. Riviera): Mr. Miller, a few moments ago you described the use of Plaintiff's Exhibit No. 1. Does the Plaintiff's Exhibit No. 2 show in a pictorial fashion the use of Plaintiff's Exhibit No. 1? A. Yes, sir.

Mr. Riviera: If your Honor please, I offer Plaintiff's Exhibits Nos. 1 and 2 into evidence.

The Court: Hearing no objection, each of them is admitted.

(Plaintiff's Exhibits Nos. 1 and 2 for identification were admitted in evidence.)

The Court: Now you can ask him to describe the information reflected by each of the two.

Mr. Riviera: Thank you, your Honor.

The Court: Will you for my convenience state

(Testimony of Myron Charles Miller.)

again, if you have not already, what kind of information is reflected by Plaintiff's Exhibit 2? What kind of information, what do you seek to show by [8] that exhibit, if you seek to show anything?

This is complete ready to——

The Court: What does it show?

A. It shows the Herring Magic actionizer attached to a minnow.

The Court: You may proceed.

Mr. Riviera: Very well, your Honor.

The Witness: In this manner we use it for luring salmon and various other fish.

Mr. Riviera: May I have Plaintiff's Exhibit No. 3 marked for identification?

The Court: That will be done.

The Clerk: Plaintiff's Exhibit 3.

(A patent was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Riviera): Mr. Miller, do you have Plaintiff's Exhibit No. 3 before you?

A. Yes, sir.

Q. Would you tell us what it is?

A. Exhibit No. 3 is a patent.

The Court: For what?

A. For this actionizer.

The Court: As shown in what exhibit?

A. It's Exhibit No. 3, your Honor.

The Court: No, no, actionizer shown in what [9] exhibit?

A. Shown in Exhibit No. 1.

The Court: You may proceed.

(Testimony of Myron Charles Miller.)

Mr. Riviera: Thank you, your Honor.

Q. (By Mr. Riviera): Mr. Miller, a few moments ago you referred to the date at which you applied for the United States patent which has been marked as Plaintiff's Exhibit No. 3. Now, at that time during the 1940's do you know of any other fishing device in general use that would produce the same effect in fishing as Plaintiff's Exhibit No. 1?

A. No, sir, I don't know of any other one.

Q. During the 1930's, if my question were framed as to the 1930's, would your answer be otherwise?

A. The answer would be the same, sir.

Q. Are you familiar with a company known as Herring Magic, Inc.?

A. Yes, sir.

Q. Do you know when that company was formed?

A. In 1954 I believe, sir.

Q. And are you an officer of that company?

A. Yes, sir.

Q. And you are the majority stockholder?

A. That's right, sir.

Q. Subsequent to the formation of Herring Magic, Inc. did [10] it commence the manufacture of objects similar to Plaintiff's Exhibit No. 1?

A. Yes. This——

Q. Have you—excuse me.

A. Pardon me.

Q. Have you assigned in any manner the patent which has been introduced as Plaintiff's Exhibit No. 3 to Herring Magic, Inc.?

A. Yes, sir.

Mr. Riviera: If your Honor please, I offer Plaintiff's Exhibit No. 3 into evidence.

(Testimony of Myron Charles Miller.)

The Court: It is admitted.

(Plaintiff's Exhibit No. 3 for identification was admitted in evidence.)

Q. (By Mr. Riviera): Mr. Miller, when did the manufacture of Herring Magics, and by the term Herring Magics I believe Plaintiff's Exhibit No. 1, when did the manufacture of Herring Magics by Herring Magic, Inc. begin?

A. In late 1954, sir.

Q. At that time was there any advertising in existence describing the Herring Magic device?

A. Yes.

Mr. Riviera: If your Honor please, may I have Plaintiff's Exhibit No. 4 marked for identification?

The Court: That will be done.

The Clerk: Plaintiff's Exhibit 4.

(A printed folder was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Riviera): Mr. Miller, do you have Plaintiff's Exhibit No. 4 before you?

A. Yes, sir.

Q. Would you please tell us what it is?

A. Exhibit No. 4 is a printed folder that was used in the first Herring Magic boxes, along with the Herring Magic actionizer.

Q. Do you recall when the——

The Court: Pardon me just a minute. What is the nature of the information if any contained in that folder?

A. Your Honor, it briefly describes the Herring

(Testimony of Myron Charles Miller.)

Magic actionizer and contains suggested rules or instructions for its use.

The Court: Proceed.

Mr. Riviera: Thank you, your Honor.

Q. (By Mr. Riviera): Mr. Miller, do you recall when Plaintiff's Exhibit No. 4 was actually printed for you?

A. I'm sorry, I didn't get that question, please.

Q. Very well. Do you recall when Plaintiff's Exhibit No. 4 was printed up? [12]

A. Do I recall when it was printed?

Q. When it was first printed up, yes.

A. In 1954.

Q. Was Plaintiff's Exhibit No. 4 printed up before you went into production of Herring Magics or after? A. Before.

Q. Several months before? A. Yes, sir.

Mr. Riviera: If your Honor please, I offer Plaintiff's Exhibit No. 4 into evidence.

Mr. Bowden: No objection.

The Court: It is admitted.

(Plaintiff's Exhibit No. 4 for identification was admitted in evidence.)

Q. (By Mr. Riviera): Mr. Miller, will you look at Plaintiff's Exhibit No. 3, the patent. Who were your attorneys who prepared the application for Plaintiff's Exhibit No. 3?

A. Mr. Ford Smith of the firm of Smith & Tuck, patent attorneys.

Q. Mr. Miller, in preparing the application for

(Testimony of Myron Charles Miller.)

Plaintiff's Exhibit No. 3 was it your suggestion that the term "fish lure" be used? A. No, sir.

Q. Did the fact that the term "fish lure" was being used—— [13]

Mr. Bowden: Your Honor, I don't mind him leading a little, but I think he has gone too far.

The Court: Yes, the objection is sustained.

Mr. Riviera: Very well.

The Court: Of course, you know quite well the best way to do that is to ask if anyone made any such suggestion and, if so, who, and so on. Proceed.

Q. (By Mr. Riviera): Mr. Miller, did the term "fish lure" as used in Plaintiff's Exhibit No. 3 give you any concern when the application was made?

A. Yes, sir.

Q. In what manner? Why were you concerned?

A. Well, in my own thinking I could never accept it as a fish lure until something, some minnow or something is put in there to attract the fish.

Q. Did you object to the use of this term with your attorney?

A. I think I rather accepted my attorney's judgment on it at that time.

Q. In Plaintiff's Exhibit No. 4—would you please glance at Plaintiff's Exhibit No. 4—is the word "lure" used in Plaintiff's Exhibit No. 4?

A. Yes.

Q. At the time that Plaintiff's Exhibit No. 4 was printed was there any other term in general use describing the [14] Herring Magic device?

Mr. Bowden: Your Honor, I think that question

(Testimony of Myron Charles Miller.)

could be more appropriate, "Did you know of any other term," rather than "Was there".

The Court: Of course all these questions could be put in a form that could not be successfully attacked as leading by asking him, "State if you know," so and so, or in some other particular form I have found that the knowledge of the witness may be properly sought, and if he has the answer by some such question along the form that I suggested, the Court does not require that form.

Mr. Riviera: Very well, your Honor.

Q. (By Mr. Riviera): Mr. Miller, I will rephrase that question. At the time when Plaintiff's Exhibit No. 4 was printed up did you know of any other term that—— A. No, sir.

Q. Let me finish the question. Did you know of any other term in general use describing the use of Plaintiff's Exhibit No. 1? Is your answer the same?

A. Well, myself, I always——

The Court: Answer yes or no to that last question. If you do not understand the question, the Court will have it read for you.

The Witness: I would like the question again, [15] please.

The Court: It will be read.

(The reporter read back as follows: "Q. At the time when Plaintiff's Exhibit No. 4 was printed up did you know of any other term that—— "A. No, sir. "Q. Let me finish the question. Did you know of any other term in

(Testimony of Myron Charles Miller.)

general use describing the use of Plaintiff's Exhibit No. 1? Is your answer the same?")

The Court: Answer yes or no.

A. I will—I'll answer yes, sir.

Q. (By Mr. Riviera): What other term?

A. Actionizer.

Q. Do you know who suggested the term "actionizer"? A. Yes, sir.

Q. Who did? A. I did.

Q. Other than the term "actionizer" do you know of any other term? A. No, sir.

Mr. Riviera: If the Court please, may I have Plaintiff's Exhibit No. 5 marked for identification?

The Court: That will be done.

The Clerk: Plaintiff's Exhibit 5.

(A counter display card was marked Plaintiff's Exhibit No. 5 for identification.)

The Court: It did not occur to me that a tax case would involve a lot of exhibits. Now I ask Government Counsel to immediately get in touch with opposing Counsel in the two remaining cases and arrange a pretrial proceeding between Counsel as soon as possible and before the trials begin on all matters which may be the proper subject of pretrial proceedings.

Mr. Bowden: Thank you, your Honor.

The Court: You may proceed.

Q. (By Mr. Riviera): Mr. Miller, do you have Plaintiff's Exhibit No. 5 before you?

A. Yes, sir.

Q. Would you describe it?

(Testimony of Myron Charles Miller.)

A. Exhibit No. 5 is a counter display card.

Q. Do you know when Exhibit No. 5 was printed up?

A. It was in 1955, early in 1955.

Q. Was Plaintiff's Exhibit No. 5 printed up at your direction?

A. Yes, sir.

Q. And did you use Plaintiff's Exhibit No. 5?

A. Yes, sir. [17]

Q. In what year?

A. 1955.

Mr. Riviera: I offer Plaintiff's Exhibit No. 5, your Honor.

The Court: Did you say you offer it?

Mr. Riviera: Yes, I do, your Honor.

The Court: Any objection?

Mr. Bowden: No objection, your Honor.

The Court: It is admitted.

(Plaintiff's Exhibit No. 5 for identification was admitted in evidence.)

Mr. Riviera: May I have Plaintiff's Exhibit No. 6 marked for identification?

The Court: That will be done.

The Clerk: Plaintiff's 6.

(A jobber sheet was marked Plaintiff's Exhibit No. 6 for identification.)

The Court: State if you know what kind of information Plaintiff's Exhibit 6 reflects.

A. Exhibit 6 is used as a jobber sheet.

The Court: Jobber—

A. Jobber sheet.

The Court: Sheet. Do you spell it j-o-b—

A. J-o-b-b-e-r.

The Court: You may proceed. [18]

(Testimony of Myron Charles Miller.)

The Witness: It's used in the jobber catalogue.

The Court: That is sufficient.

Q. (By Mr. Riviera): Mr. Miller, do you know when Plaintiff's Exhibit No. 6 was printed up?

A. Yes, sir. At the same time as the counter card, in 1955.

Q. Do you know if Plaintiff's Exhibit No. 6 was ever used? A. Yes, sir.

Q. Who used it? A. Seattle jobbers.

Mr. Riviera: If your Honor please, I offer Plaintiff's Exhibit No. 6 into evidence.

The Court: Any objection?

Mr. Bowden: No objection, your Honor.

The Court: It is admitted.

(Plaintiff's Exhibit No. 6 for identification was admitted in evidence.)

Mr. Riviera: May I have Plaintiff's Exhibit No. 7 marked for identification?

The Court: I wonder if you could not just have all of these exhibits now marked, just mark them all.

Mr. Riviera: Very well, your Honor.

The Clerk: Plaintiff's Exhibit 7. [19]

(Advertisement of Herring Magic was marked Plaintiff's Exhibit No. 7 for identification.)

The Court: You ought to have an envelope for exhibits that are not easily handled.

Mr. Riviera: I will provide an envelope this afternoon.

The Court: If the clerk does not have any en-

(Testimony of Myron Charles Miller.)

velopes I ask him to send the bailiff now to get some. How many exhibits have you that will involve fishhooks?

Mr. Riviera: There is an additional exhibit which will involve fishhooks, your Honor, but it is quite large and we will have a container for it.

The Court: Very well. Proceed.

The Clerk: Plaintiff's 8 and 9.

(Example of a Herring Magic device with red dot was marked Plaintiff's Exhibit No. 8 for identification.)

(Letter dated June 8, 1955, from District Director, Internal Revenue Service, to Myron Miller, was marked Plaintiff's Exhibit No. 9 for identification.)

The Clerk: Plaintiff's 10.

(Copy of Claim for Refund was marked Plaintiff's Exhibit No. 10 for identification.)

The Clerk: Plaintiff's 11. [20]

(Letter from District Director, Internal Revenue Service, to Herring Magic Inc., was marked Plaintiff's Exhibit No. 11 for identification.)

The Court: Is that all of them, Mr. Bruff?

The Clerk: Yes, your Honor.

The Court: Are both Counsel, Counsel on both sides, acquainted with these Exhibits 7 to 11, inclusive, so far as their nature is concerned?

Mr. Riviera: It's my understanding that we are, your Honor.

(Testimony of Myron Charles Miller.)

Mr. Bowden: Yes, your Honor, we've gone over them.

The Court: Mr. Riviera, if you think you can agreeably to opposing Counsel do so, state what information each one possesses, give it a character name.

Mr. Riviera: Very well, your Honor.

The Court: A one word name, if possible, that reasonably reflects the nature of the information.

Mr. Riviera: I will try, your Honor.

The Court: No. 7 first. And if opposing Counsel has any objection to this he will please say so.

Mr. Riviera: If your Honor please, I'm holding Plaintiff's Exhibit No. 7, which is an example of a type of advertising used by Herring Magic, Inc.

Mr. Bowden: Your Honor, I would have to [21] object to that. I'd like to be a little more precise and have the title to it read, perhaps. We have a number of different types of advertising samples in evidence already.

The Court: Which particular type of advertising is this, if it has a particular type?

Mr. Riviera: Yes, your Honor, this is a type of advertising used by Herring Magic, Inc., for distribution to wholesalers for their use in advertising Herring Magic, Inc. It has——

The Court: Was there any other type of advertising furnished by plaintiff which was for the wholesale use?

Mr. Riviera: No, your Honor.

The Court: All right.

(Testimony of Myron Charles Miller.)

Mr. Riviera: This advertising is different from the other in that a space is provided for the wholesaler or dealer's own name.

The Court: All right. Wholesaler's type of advertising, is that it?

Mr. Riviera: Yes, your Honor.

The Court: The next one.

Mr. Riviera: I'm holding in my hand Plaintiff's Exhibit No. 8, which is an example of a Herring Magic device, and differs from Plaintiff's Exhibit No. 1 [22] in that a red colored dot is suspended in the plastic.

The Court: Actionizer with a red dot, is that right?

Mr. Riviera: Yes, your Honor.

The Court: Next, No. 9.

Mr. Riviera: I'm holding in my hand Plaintiff's Exhibit No. 9, which is the original letter dated June 8, 1955 from the office of the District Director of Internal Revenue to Mr. Myron Miller expressing the office's opinion as to the applicability of the tax to the Herring Magic device.

The Court: You ought to have a shorter name than that describing it.

Mr. Riviera: Well, it's a letter from the District Director's office dated June 8, 1955.

The Court: Can you give a better name than that? Somebody ought to.

Mr. Bowden: Just District Director's letter would be sufficient for my purposes, your Honor, together with Commissioner's ruling.

(Testimony of Myron Charles Miller.)

Mr. Riviera: Yes.

The Court: Was the ruling favorable or unfavorable from the taxpayer's standpoint?

Mr. Riviera: From the taxpayer's standpoint it was unfavorable. The ruling was not attached to the [23] original letter, but Counsel and I have agreed that a copy of it should be attached at this time.

The Court: Unfavorable to the taxpayer but favorable to the Internal Revenue?

Mr. Riviera: Yes, your Honor.

The Court: Next one.

Mr. Riviera: Plaintiff's Exhibit No. 10 is a copy of plaintiff's claim for refund.

The Court: Refund claim. The next one?

Mr. Riviera: Plaintiff's Exhibit No. 11 is the District Director's letter disallowing the claim, a letter of disallowance.

The Court: Refund disallowance, is that right?

Mr. Riviera: Yes, your Honor.

The Court: Do you offer each one of these?

Mr. Riviera: Yes, I do, your Honor.

The Court: Any objection?

Mr. Bowden: No objection, your Honor.

The Court: Plaintiff's Exhibits 7 through 11 are admitted, each and all of them.

(Plaintiff's Exhibits Nos. 7, 8, 9, 10 and 11 for identification were admitted in evidence.)

The Court: Now proceed with something else [24] other than exhibits.

Mr. Riviera: Very well, your Honor.

Q. (By Mr. Riviera): Mr. Miller, will you pick

(Testimony of Myron Charles Miller.)

up Plaintiff's Exhibit No. 9. Do you know who made inquiry of the District Director's office that elicited Plaintiff's Exhibit No. 9?

A. Yes, sir. I did.

Q. Do you recall when you made the inquiry?

A. No, I do not.

Q. From the date of Plaintiff's Exhibit No. 9 can you fix an approximate date when you made inquiry?

A. I would say about April, possibly, of 1955.

Q. Was the inquiry made oral or written?

A. Oral.

Q. When you made this inquiry was anyone else present with you? A. No, sir.

Q. To whom did you speak at the office of the District Director?

A. I believe it was Mr. Graham.

Q. At the time you made the inquiry did you have any examples of the Herring Magic device with you? A. Yes, sir.

Q. Among the exhibits before you is there any example?

A. It isn't here now. I believe it's Exhibit No. 8. [25]

The Clerk (Handing exhibit to witness): Is that it? A. That's right, Exhibit No. 8.

Q. (By Mr. Riviera): At the present time, Mr. Miller, are Herring Magics manufactured with the red dot? A. No, sir.

Q. When were Herring Magics manufactured with the red dot? A. In 1954.

(Testimony of Myron Charles Miller.)

Q. Were samples, or were Herring Magics similar to Plaintiff's Exhibit No. 8 sold to the public generally?

A. A very few were sold in early 1955, possibly January.

Q. Do you know whose suggestion it was to place the red dot in the Herring Magic device?

A. It was the suggestion of one of our dealers.

Q. And how long was the red dot used in a Herring Magic device?

A. Possibly two months.

Q. At the time you made inquiry of the District Director's office do you know if Herring Magic devices were then manufactured with the red dot?

A. No, sir, they were not.

Q. Did you inform the gentleman to whom you made inquiry at the District Director's office of that fact? A. I'm sure I did.

Mr. Riviera: If your Honor please, we have [26] one or two other exhibits of a different nature which I should like to introduce at this time.

The Court: You may bring them forward. Proceed in the same manner you did with the last three or four.

I would like to say that the Court does not feel that the Court will be greatly benefited by any works of art or by any balloonizing of photographs or any artly studies of pictures. The things themselves as they were, as I understand it, facsimiles of the things, have been received in evidence. Have that in mind, will you?

(Testimony of Myron Charles Miller.)

Mr. Riviera: Yes, your Honor.

The Court: Proceed.

The Clerk: Plaintiff's Exhibit No. 12.

(A board containing a display of lures was marked Plaintiff's Exhibit No. 12 for identification.)

The Clerk: Plaintiff's Exhibit No. 13.

(A jar of water containing a Herring Magic device was marked Plaintiff's Exhibit No. 13 for identification.)

Mr. Riviera: If your Honor please, Plaintiff's—

The Court: This exhibit for identification 13 [27] is a good illustration of what should not ever be done. You have apparently a clear glass jar containing a clear liquid as if it were water, and anybody knows that glass will break on the slightest provocation, and almost anyone who has had any experience from their infancy with handling other people's gadgets usually know that the first stranger to the exhibit who starts to pick it up and handle it will drop it and the glass will break and the water will run all over everything around it. Now what is there about this exhibit that is needful in this litigation?

Mr. Riviera: If your Honor please, Plaintiff's Exhibit No. 13 has this point: We sought to have an example for the Court's own inspection of the effect, the visual effect of the Herring Magic device in water. In this particular case Plaintiff's Exhibit No. 13 is filled with clear tap water.

(Testimony of Myron Charles Miller.)

The Court: Also most people would know that water and the objects in the water or submerged in the water, all of which water and submerged objects contained within the glass wall, have a different than a natural view to the ordinary human eye, and the chances are that some sort of either the diminution of size or enlargement of size of the objects will be effected by the glass wall and water surrounding the objects and [28] will make of it an unnatural thing or exhibit. You may proceed.

Mr. Riviera: If your Honor please, I have described Plaintiff's Exhibit No. 13. I have not described Plaintiff's Exhibit No. 12.

The Court: You may proceed.

Mr. Riviera: Plaintiff's Exhibit No. 12 is a display of articles commonly called lures by the general public, and it is a display of common ones being used at the present time. I offer Plaintiff's Exhibit Nos. 12 and 13 into evidence, your Honor.

Mr. Bowden: Your Honor, I take it that Exhibit 13 is a duplication of Exhibit 1. Am I correct or am I inaccurate? If it is, why I feel——

The Court: Let Counsel see it. Exhibit No. 12 is a board. Exhibit No. 12 is a board, an array of things on it, is it not?

Mr. Bowden: Yes, your Honor, it is. I was just inquiring about Exhibit No. 13, which is the item that is immersed in water.

(Plaintiff's Exhibit No. 13 for identification was handed to Mr. Bowden.)

(Testimony of Myron Charles Miller.)

Mr. Bowden: I'm not a technician, but I would like to ask of Counsel, is that a duplicate of Exhibit No. 1? [29]

Mr. Riviera: It is a duplicate in the sense that it is the same device. It is a different size. Other than that it is the same.

I believe we stipulated that such a device, such an exhibit could be introduced subject only to the objections covered in the stipulation.

Mr. Bowden: To relevancy, your Honor, and I'm just trying to find out whether that is truly relevant to this controversy since we do have one in. If, however, it is to show that it is invisible, why I of course can see that it is visible in the jar.

The Court: Could you see it anywhere else? Is there any dispute on that, that it is invisible in water?

Mr. Bowden: Our witnesses will testify that it is not invisible in water, your Honor.

The Court: Proceed. This exhibit is meant to bear upon that question, indicative according to plaintiff's contention that this exhibit indicates it is invisible, is that right?

Mr. Riviera: In the general matter, yes, your Honor, that's right.

The Court: That question is in dispute, is it?

Mr. Riviera: Apparently it is, your Honor. [30]

The Court: Do you offer Exhibit 13?

Mr. Riviera: 12 and 13, your Honor, yes.

The Court: Each of them is now admitted.

(Testimony of Myron Charles Miller.)

(Plaintiff's Exhibits Nos. 12 and 13 for identification were admitted in evidence.)

Q. (By Mr. Riviera): Mr. Miller, would you examine Plaintiff's Exhibit No. 12. Are you familiar, Mr. Miller, with the devices shown on Plaintiff's Exhibit No. 12? A. Yes, sir.

Q. Would you describe how you would use any one of them? Pick any one out.

A. Well, this spoon on the top is complete and capable of luring a salmon by drawing it through the water. You don't need anything else with it, such as a minnow or anything like that. Each of these are capable of attracting and luring a fish by themselves.

Q. Mr. Miller, each of the devices shown on Plaintiff's Exhibit No. 12, do you use each of those devices with or without some other form of bait such as worms or minnows?

A. Most of these are complete in themselves. I personally wouldn't put anything with them, such as a worm or the tail of a herring or anything like that. They're complete by themselves.

Q. Mr. Miller, referring again to Plaintiff's Exhibit No. [31] 12, do any of the devices—do you know if any of the devices on Plaintiff's Exhibit No. 12 produce any action simulating live bait when used in the water?

A. Yes. This one marked "B" has a revolving action in the water. It has a—similar to a crippled herring. However, it does not produce a swimming action, it only revolves.

(Testimony of Myron Charles Miller.)

Q. Is there any device upon Plaintiff's Exhibit No. 12 that will produce a swimming action?

A. Yes. Now, this plug marked "M" will have a swimming action, but it is not the true swimming action of a minnow.

Q. Mr. Miller, have you ever observed the use of the Herring Magic device in the water when a minnow is placed in the device? A. Yes, sir.

Q. Would you describe the action of the device with the minnow in the water when used?

A. The herring when inserted in the Herring Magic actionizer becomes alive and swims precisely the way it would if it were alive and being pursued by a feeding fish.

Q. When you say "alive," do you mean that the body of the fish simulates life?

A. That's right, sir.

Q. What causes this movement of the minnow?

A. The actionizer as it is drawn through the water becomes a mechanical device by means of the pressure on the water—the water pressure, rather, excuse me, and that conveys the action right back into the dead fish and makes it come to life.

Q. Does any portion of the dead fish to which you have just made reference move?

A. Yes, sir.

Q. What portion?

A. Every part of the body of the dead minnow moves.

The Court: At this point we will take about a ten minute recess.

(Testimony of Myron Charles Miller.)

(Short recess.)

The Court: All are present. You may proceed.

Mr. Riviera: Thank you, your Honor.

Q. (By Mr. Riviera): Mr. Miller, is the Herring Magic device, an example of which has been introduced as Plaintiff's Exhibit 1, is the Herring Magic device designed to be used alone?

A. No, sir.

Q. Have you ever used it alone without a minnow? A. Yes, sir.

Q. Would you describe what occurs or what did occur when you so used it?

A. There isn't any balance if it doesn't have a minnow [33] in it.

Q. What action occurs with the Herring Magic device in the water? That is to say, what does the device itself do in the water when used alone?

A. It just tumbles around in the water. It usually twists up in the water, twists the leader up.

Mr. Riviera: That concludes my direct examination at this time, your Honor.

The Court: You may inquire.

Cross Examination

Q. (By Mr. Bowden): With respect to Plaintiff's Exhibit 3, a copy of the patent, you stated that you signed the application which ultimately obtained this patent, is that correct?

A. Yes, sir.

Q. And contained in this patent, is it true that it is headed Fish Lure and states that it is a fish

(Testimony of Myron Charles Miller.)

lure throughout the entire patent? A. Yes, sir.

Q. Now, in respect to Plaintiff's Exhibit 4, which has been referred to as old advertising, does that state the Herring Magic being quote a hot lure unquote? A. Yes, sir.

Q. In respect to Plaintiff's Exhibit No. 5, which has been [34] referred to as a counter placard, does that also state that the Herring Magic is a lure, or is the word "lure" used on that particular piece of advertising? A. Yes, sir.

Q. With respect to Plaintiff's Exhibit 6, which has been referred to as a jobber sheet,—

A. Yes, sir.

Q. Do you have that before you, Mr. Miller? Yes. Does that also have the word "lure" on it?

A. Yes, sir.

Q. In respect to Plaintiff's Exhibit 7, which is a wholesaler's type of advertising, does that also have the word "lure" on it?

A. I don't see it, sir.

Q. Would you look at it very carefully? "Lure" or "lures", pardon me. A. Yes, sir.

Q. It does? A. Yes, sir.

Q. Mr. Miller, what in your opinion would you say constituted a lure? How would you define a lure, in other words?

A. Well, I would define a lure as a device capable of attracting and hooking a fish, a game fish.

Q. Now, what would that necessarily have to consist of?

A. Various spoons, plugs, various minnows. [35]

(Testimony of Myron Charles Miller.)

Q. Well, and how are fish lured? In other words, what attracts a fish?

A. Oh, I would imagine that any device that closely simulates the natural food they eat would attract them.

Q. Well, more precisely, Mr. Miller, what does your particular device do which is intended to attract fish?

The Court: If it is so intended.

A. The Herring action—Herring Magic actionizer is nothing until a minnow is put in it. There isn't any action, there isn't anything there except the hooks as far as visibility is concerned. It was never intended to be used without a minnow.

Q. Well, we——

The Court: Is it claimed by you in the patent or is it in fact claimed by you that it does have some feature that a minnow does not have in and of itself alone in attracting a fish to the hook or to the bait?

A. Your Honor, I've never—no, sir, I've never thought of it that way at all.

The Court: You have not? A. No.

The Court: In other words, just any old actionizer, no matter what kind, would be expected to produce as good results to a sport fisherman as yours, is that right? [36]

A. No, Your Honor. The action——

The Court: What is there about yours that is particularly efficient in bringing about the object

(Testimony of Myron Charles Miller.)

of a sport fisherman, namely catching a fish on the hook that is on the end of the leader?

A. Your Honor, the action imparted to a herring by the Herring Magic actionizer gives it a very realistic live swimming action.

The Court: For what purpose do you want that?

A. It's the only way I know of to get a fish to hit.

The Court: You want to catch a fish, is that right? A. That's right, sir.

The Court: And you use that actionizer to help attract that fish onto your hook, is that right?

A. Yes, Your Honor. When you bait it with a minnow, then you have a complete unit capable of attracting and catching a fish.

The Court: Would a minnow baited hook catch as many fish without your actionizer as it would with it according to your idea of its function?

A. No, sir.

Mr. Bowden: I'm sorry, I didn't get the answer to that question, Mr. Miller. [37]

A. Oh, I'm sorry.

Mr. Bowden: Would you read His Honor's question?

The Court: Read the question.

(The reporter read the last question by the Court as follows: "Would a minnow baited hook catch as many fish without your actionizer as it would with it according to your idea of its function?") A. No, sir.

The Court: You may inquire.

(Testimony of Myron Charles Miller.)

Q. (By Mr. Bowden): In your opinion, Mr. Miller, would a hook baited with a dead minnow constitute a lure?

Mr. Riviera: If Your Honor please, I object to this question. I would be glad to ask similar questions myself, but I believe that is the function of the law, to determine what—these opinions I believe hinge on the legal definition of the very term in issue.

The Court: The objection is overruled.

The Witness: May I have that question again, please?

The Court: It will be read, Mr. Reporter.

(The reporter read the last question.)

A. Yes, sir. [38]

Q. (By Mr. Bowden): It would constitute a lure? A. Yes, sir.

Q. Well, going back one moment to how you define a lure and what a lure is intended to do, would you still say that a hook baited with a dead minnow would constitute a lure? A. Yes, sir.

Q. Now, your device improves upon that device, is that your—would you say that, Mr. Miller?

A. Pardon me, sir?

Q. Your particular device, the Herring Magic, does that improve upon the hook with the dead herring on it? In other words, what does it do in addition to what would be done already?

A. It very definitely gives it a superior action to the action you'd get by just the herring itself.

(Testimony of Myron Charles Miller.)

Q. Well, then it is the action that attracts the fish, is that your testimony, Mr. Miller?

A. It is the action of the herring that attracts the fish.

Q. Yes, but you don't have that action unless you've got your device attached to it, is that correct?

A. There are many means of obtaining action. I'm sorry——

Q. Mr. Miller, just one question. Is it your device that causes the fish—causes the attraction in the dead fish? [39]

A. Yes, sir.

Q. In other words, the fish in and of itself is dead, it's immobile; it will not move, will it?

A. That's right, sir.

Q. Now, when you hook your device to it, why then motion is commenced when it's pulled through the water, is that correct?

A. That's correct, sir.

Q. Now, it is this motion that attracts the fish, is that correct?

A. That is right.

Q. And it's your actionizer that causes the motion, is that correct?

A. No, sir.

Q. Well, then, what does cause this motion?

A. The herring must be in there to get the action. The herring must be connected to the actionizer to get the action.

Q. Well, now, you previously said that the thing wouldn't work or isn't intended to work in and of itself, isn't that correct?

A. That's right, sir.

(Testimony of Myron Charles Miller.)

Q. And you also said it requires some balancing or some weighting, is that correct?

A. That's right. [40]

Q. Now, you say it won't work unless it's got the herring in there. Now, does it necessarily have to have a herring in there? Couldn't it have some other type of weighting or balancing?

A. I've never tried it with anything else, sir.

Q. Well, you've said you've fished rather extensively, haven't you, Mr. Miller?

A. Yes, sir.

Q. But you haven't had occasion to use this particular device other than with a minnow or herring in it, is that correct?

A. That's correct, sir.

Q. But you don't know whether it would work with some other weighting? In other words, a strip of herring or a weight or something like that, you're not prepared to say whether it would attract fish or would attract fish in that particular posture?

A. Yes, sir, I would say that if a strip of herring is put in similar to a whole herring, that would accomplish the object of making that strip swim, if it is the proper size and put in there properly.

Q. But it is your device that makes it appear—gives it that swimming appearance?

A. Yes, sir, that's right.

Q. Now, what is it in your device that actually attracts [41] the fish then, if I may go back to that, is it the motion, is it the color, is it the smell, just exactly what does attract the fish?

A. It is the struggling swimming action pro-

(Testimony of Myron Charles Miller.)

duced by the herring or the minnow or the cut bait, and also the taste of the cut minnow or the herring in the water.

Q. What is your understanding of bait, Mr. Miller? A. Minnows?

Q. No, no, just bait in general.

A. Well, I would—I still would have to stay with the minnows.

Q. Well, in other words I'm not much of a fisherman, Mr. Miller, so you'll have to go slow with me on this, but as I recall we've used such things as worms on hooks, small mackerel, we've used any number of different types of things which are intended to catch fish.

Now, fish are attracted to that, what, because of the smell, is that what attracts them, and we're using that as bait, aren't we?

In other words, its sole purpose is it looks like something good to eat, so the fish grabs it. Now, how do you define bait?

A. I don't know how I would describe anything else except a minnow in this because it's precisely intended for a minnow. [42]

Q. Well, now, are you saying that the minnow is put in here as bait? A. That's right, sir.

Q. Oh, I see. Well, now, I didn't understand it. I understood that that was part of the lure. Now, you're actionizing bait, is that what your device is intended to do, Mr. Miller?

A. That's right, sir.

Q. Now, we were speaking some time ago, or

(Testimony of Myron Charles Miller.)

you were speaking some time ago, Mr. Miller, of the fact that this device was not complete in and of itself, it required an additional something. Was your testimony along those lines, Mr. Miller?

A. Yes, sir.

Q. Now, let me establish this: You examined Plaintiff's Exhibit 12 which was a display of lures, I believe, and you indicated that substantially all of those were complete in and of themselves. Now, are there other lures, other devices known as lures which are sold and which are known in the industry as lures which require the addition of some other thing?

A. There are actionizers or harnesses, some people call them harnesses, that are used to receive a bait.

Q. Well, now, you say they are actionizers or they are used to receive bait. Are they known in fishing circles as [43] lures or are they known as actionizers? In other words,—well, answer that question if you don't mind, Mr. Miller.

A. Pardon me? Yes. I don't believe they are called lures unless they are complete.

Q. In other words, they require nothing in addition to the object or the device which is shown there on Plaintiff's Exhibit 12, is that correct?

A. I would like to have that again, please. I'm sorry.

Q. I'd like to rephrase that question for your assistance, Mr. Miller. Is it your testimony that

(Testimony of Myron Charles Miller.)

lures are generally understood in fishing circles as being complete in and of themselves?

A. Yes, sir.

Q. And furthermore that to be a lure, a lure does not require the addition of another object, whether it be bait, whether it be a weight or whether it be a sinker or something like that, it's complete in and of itself? A. That's right, sir.

Q. That's your understanding?

A. Yes, sir.

Mr. Bowden: I have no further questions, your Honor. [44]

Redirect Examination

Q. (By Mr. Riviera): Mr. Miller, your last answer was directed—was in answer to a question somewhat to the effect that the device is complete in and of itself, and Mr. Bowden used the words “sinkers” or “leads” or something like that. Now, Mr. Miller, other devices that Mr. Bowden referred to that attract in and of themselves, do they require any minnows, worms or cut fish?

A. Some of them do.

Q. Do you ever use sinkers on your pole or lines when you are using the Herring Magic?

A. Yes, sir.

Q. Do you know if that is the general practice?

A. Yes, sir.

Mr. Riviera: No more questions.

Mr. Bowden: No more questions, your Honor.

The Court: Suppose you took a piece of wood painted like a herring and put it inside of a clock-

(Testimony of Myron Charles Miller.)

work or some other kind of a machine that would activate it; what interpretation would you put on the result? A lure or a device?

A. Your Honor, I would call that a device.

The Court: You would?

A. Yes, sir. [45]

The Court: In other words, the sum total is not a lure, it is still a device that causes the actionizer producing the object of the lure, or the device is itself something that was introduced into what appears to be the luring thing, is that your reason for your conclusion?

A. I don't quite understand, your Honor. I'm sorry.

The Court: Your actionizer is on the outside of what you call the lure, is it not, the fish?

A. Yes, that's right, your Honor.

The Court: The fish, the bait, the dead herring in your instance you claim is the lure, do you not?

A. Yes, sir.

The Court: And your actionizer you claim is a device?

A. Yes, sir.

The Court: Suppose your actionizer was inside the dead herring and made it appear to have life and therefore more attractive and more alluring to the fish to be caught; would that make any difference on your concept of whether the finished product was a lure or a device?

A. No, sir. [46]

The Court: It would not, it would still be a

(Testimony of Myron Charles Miller.)

device. Your apparatus if put inside the fish as a clockworks or a motor or some kind of an electric propelled action would still be a device if put inside the dead herring, is that right?

A. Yes, sir.

The Court: You may proceed.

Mr. Riviera: The plaintiff calls Mr. Gordon Frear.

(Witness excused.)

GORDON S. FREAR

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Riviera): Would you please state your name? A. Gordon S. Frear.

Q. And where do you live?

A. 11213 First Northwest, Seattle.

Q. And what is your present occupation?

A. I'm in the advertising business and the publishing business in the outdoor field.

Q. What publications do you publish, if any?

A. Pacific Northwest Fishing and Hunting Guide, we're in our [47] twentieth year; Fishing and Hunting News in Oregon, and Outdoor Empire News in the State of Washington. They are weekly newspapers.

Q. Have you yourself engaged in the sport of fishing? A. Yes, sir.

Q. For how long?

(Testimony of Gordon S. Frear.)

A. As long as I can remember.

Q. Do you give talks in this field?

A. Yes, I lecture in the field at sports clubs, show movies, take pictures which I attempt to sell. I have given demonstrations.

Q. Do you manufacture any fishing gear?

A. I tie my own flies for my own personal use.

Q. But nothing commercially?

A. No, that's right.

Q. And are you familiar with the various outlets in the City of Seattle for fishing gear?

A. Yes. I sell to and do business with a good many manufacturers of fishing equipment and also the jobber outlets and also the dealer outlets in the Northwest.

Q. When you say "the Northwest," what states do you refer to?

A. Well, Washington and Oregon mainly.

Q. Have you ever used the device known as Herring Magic? A. Yes, I have. I have, yes.

Q. Have you ever had occasion to use the Herring Magic device without a dead fish attached to it?

A. Well, the thought has never occurred to me until this case came up.

Q. Mr. Frear, would you examine Plaintiff's Exhibit No. 12. Are you familiar with the objects shown on Plaintiff's Exhibit No. 12?

A. Most of them I'm familiar with, yes.

Q. Have you used any of them yourself?

(Testimony of Gordon S. Frear.)

A. Well, if not these exact ones, ones very similar to them, yes.

Q. In the use of the objects shown on Plaintiff's Exhibit No. 12 do you use any bait, for example worms, fish or cut fish, in addition to the object itself?

A. Well, these spoons, plugs or lures are all intact in themselves and perform a complete catching action as they are.

Q. In your opinion is the Herring Magic device, an example of which has been introduced as Plaintiff's Exhibit 1, is the Herring Magic device capable of attracting fish by itself?

A. Well, I know of—I wouldn't say—I wouldn't say that it's impossible, but I wouldn't think that anybody that's out for fishing for fun would waste their time with a device like the Herring Magic in the water without [49] inserting a herring in it.

Mr. Riviera: Your witness.

Cross Examination

Q. (By Mr. Bowden): Your name is pronounced Mr. Frear? A. Frear, yes, sir.

Q. Frear. You're in the advertising business, you stated?

A. Yes, sir. I'm in the advertising business and the writing business. I sell stories. I had my own television program here a while back.

Q. Now, in that particular business, like many businesses, we have, oh, what might be termed codes of ethics or responsibilities to our consumers and

(Testimony of Gordon S. Frear.)

things like that. I don't mean to be too precise, but we have certain obligations in our advertising, don't we?

A. I would say that's certainly true.

Q. Now, you've been here during the entire trial and you've heard us refer to certain advertising, have you not? A. Yes, sir.

Q. You're familiar with that advertising in a general way?

A. Yes, I have seen some of the Herring Magic ads and mostly—clear back from the time when it started; I can't remember exactly.

Q. In that advertising don't they generally refer to this [50] device as a lure?

A. Well, I think—you're asking my opinion now, right?

Q. No, I'm just asking whether they do in fact. Don't they refer to it as a lure in that advertising?

A. Well, now, that's something that I can't be sure of. I remember the word "actionizer" real well, because I happen to have written an ad for that firm several months ago myself, and we stressed the word "actionizer."

Q. I see. You stressed the word "actionizer"?

A. Yes.

Mr. Bowden: I wonder if we can show the witness Plaintiff's Exhibit 4.

(The exhibit was handed to the witness.)

Q. (By Mr. Bowden): That has been referred to as old advertising or one of the first advertising.

(Testimony of Gordon S. Frear.)

Now, on that particular exhibit this article or this device is referred to as a lure, is that correct?

A. Yes, sir. I see it up here, "A hot lure."

Q. Excuse me for interrupting you. I don't mean to cut you off. A. It's all right.

Q. I'm just trying to expedite this matter. You say that you now have a system in preparing new advertising, is that correct, for Mr.—

A. Not necessarily new advertising, but additional [51] advertising.

Q. Oh, I see.

A. I mean—I think you'll realize any product as it progresses and more people start to use it, well, they have to go to other sources, and that's what Mr. Miller has been doing, and on several occasions we've sat down at lunch and discussed what a hot situation it was or a terrific lure. If I may use the word, I think "hot lure" is—and I may be wrong in my impression, but is there such a thing as a cliché or an expression that people pick up in the fishing trade business? We think of everything being hot that might possibly catch a fish. I see——

Q. Well, is what you're trying to say that in the industry or in the fishing business it is known——

A. Well, I mean for fun. You come off the dock and you've had a hot herring on, I mean I just—I see the word there, is all, and it reminds me of that. I see Mr. Korff there. He had the hottest

(Testimony of Gordon S. Freear.)

thing I think that was ever invented. Hot lure, hot spoon, hot spinner.

Q. So in other words you're saying that the advertising is not necessarily descriptive of what the——

A. Well, unfortunately in the fishing tackle industry it is my opinion that the majority of advertising is not given the proper thought. [52]

Q. Well, then, what in your opinion, then, is the effect of advertising a thing as a hot lure or a lure or a fishing lure, what is the effect? You as an advertising expert must know that it's going to attain that name if it's used long enough, I presume.

A. Well, I think it's rather worthless because I think the day and age of the consumer public is here and when you try and stampede them with hot type language, "This is the only thing that will work," I don't think it's worth anything any more.

Q. I wasn't referring necessarily to the hot type language, I was referring more to descriptive language. In other words, we don't call a car a bicycle and we don't call a bicycle a horse. Now, when you put out advertising which calls a thing a lure, is it a lure or is it something else?

A. Well, I—you're asking my opinion.

Q. Yes.

A. Now, I do not consider this a lure.

Q. I'm asking you your opinion of the advertising now. I'm not asking your opinion as to what you think it is. I'm asking you what the

(Testimony of Gordon S. Frear.)

effect of advertising a thing as a lure is on the general public.

A. Well, he states it pretty well, here, "Naturally catches more fish; it's the real thing, puts the natural injured [53] swimming action back in your herring."

Q. I realize that. We can all read the advertising. But you as an advertising expert, my only question is just what is the effect of calling a thing a lure upon the general public?

A. Well, I can't answer for the general public. I can answer for myself. I mean I don't think the fact that you would call this thing a lure would attempt to sell number one Herring Magic.

The Court: What is your occupation primarily?

A. I'm in the publication field, sir, and I——

The Court: Do you have anything to do with advertising and determining what mediums of advertising are good or bad?

A. Well,——

The Court: In your business of publication?

A. Yes, sir, occasionally. We have our own opinions.

The Court: Do you have anything to do with determining for your newspaper what words or mediums will be employed by your firm to accomplish the advertising service, if any, which you give to any part of your customer personnel, I mean customer trade?

A. Yes. In cases of a small manufacturer, sir, who does not employ an agency, we may occasion-

(Testimony of Gordon S. Frear.)

ally [54] advise or assist in the preparation of the copy. I would say that the majority of our accounts are nationally and controlled by large firms located in the East and the Midwest, and their copy, of course, is carefully prepared and arrives ready for insertion in the publications. On the other hand, as I mentioned, a small manufacturer may come in occasionally or something may happen and they may come to us and ask us for our opinion for what it's worth.

The Court: You may proceed.

Q. (By Mr. Bowden): Mr. Frear, then are you what might be referred to as an advertising expert?

A. I wouldn't like to be referred to particularly as an expert in anything.

Mr. Bowden: Well, may I inquire the purpose of calling this witness then, please?

Mr. Riviera: Mr. Frear has already qualified himself as to the types of publications. He publishes Pacific Northwest guides, he publishes several other sport guides. He said that he contacts sports and fishing outlets throughout the Northwest area with regard to fishing gear and tackle. He also testified that he is familiar with the wholesalers, and so forth.

Mr. Bowden: I don't mean to review his testimony, your Honor. My only impression is that he [55] himself says that he's not an advertising expert. Now, I'm——

The Court: Is your question is he offered as an expert on advertising?

(Testimony of Gordon S. Frear.)

Mr. Bowden: Yes, what is the purpose of offering this testimony. I can see no relevancy to the inquiry whatever. He himself says he's not an expert. Now,—

Mr. Riviera: Mr. Frear's own modesty, I believe, is the source of his declining to be called an expert. Many times I decline to call myself a hunter, though I occasionally go out. He has testified as to his experience in the fishing field and his allied experience, which is his primary source of livelihood, the advertising-publishing field. I believe he qualifies as an expert in two areas, in the fishing field itself and too as an expert in the experience and relationships between manufacturers and advertisers—advertisers and manufacturers of fishing gear and his own medium, the publishing field, and the public. Does that answer your question, Mr. Bowden?

Mr. Bowden: Yes. Your Honor, at this time I will interpose an objection to his entire testimony on the ground that he has not qualified as an expert. Thank you, your Honor. I have no further questions, [56] your Honor.

The Court: He has disowned for himself the quality of an expert on advertising values, has he not?

Mr. Riviera: Is your question directed to me, your Honor?

The Court: Yes. Has he done that or has he?

Mr. Riviera: I believe he has disqualified the nomenclature of expert on advertising, yes. That

(Testimony of Gordon S. Frear.)

is, the accolade, as distinguished from his practical experience and qualifications.

The Court: There is not any trouble that I know of whether you call him an advertising man or just an ordinary fellow as far as the sports fishing art is concerned without any expert knowledge. The Court will consider his testimony for whatever the Court thinks it is worth and will deny the motion to strike because he is not the kind of expert that the Counsel offering him represented he would turn out to be. The motion is denied.

Mr. Bowden: Thank you, your Honor. No further questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness—no, I think we will take a recess until two o'clock.

(Thereupon, at 11:53 o'clock a.m., a recess herein was taken until 2:00 p.m.) [57]

Tuesday, September 3, 1957.

2:00 o'clock p.m.

(All parties present as before.)

The Court: I wish to take up this trial now if there is no other matter. You may resume the trial proceedings.

Mr. Riviera: The plaintiff rests at this time, your Honor.

The Court: Very well, the plaintiff rests. You may proceed.

Mr. Bowden: The defendant at this time, your

Honor, would like to move for dismissal of this action on the ground that plaintiff has not presented a prima facie case. If your Honor please, I would like to argue that motion at this time.

The Court: No, I do not wish to hear the argument. The motion is held in abeyance until after this case is completed on the merits.

Mr. Bowden: Thank you, your Honor. May I call Willis Korff, please, to the stand.

The Court: Come forward and be sworn as a witness. [58]

WILLIS B. KORFF

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bowden): State your name, please.

A. Willis B. Korff.

Q. And your principal occupation, Mr. Korff?

A. Fishing tackle manufacturer.

Q. How long have you been engaged in that profession, Mr. Korff?

A. Since the fall of 1952.

Mr. Riviera: If your Honor please, before Mr. Bowden takes up the train of questioning of his own witness I see I neglected a formal matter and that was the matter of a trial stipulation which was to be read into the record.

The Court: Do you wish to open up your case in chief for that purpose?

Mr. Riviera: Just for that purpose, your Honor.

The Court: Is there any objection?

(Testimony of Willis B. Korff.)

Mr. Bowden: No objection, your Honor.

The Court: Then that opening up is now granted and you may proceed, Mr. Riviera.

Mr. Riviera: If your Honor please and with [59] your Honor's permission I should like to read into the record the following statements which have been stipulated between the parties hereto as true.

(Reading) "1. This is an action brought against the United States of America under the laws of the United States for the recovery of a manufacturers excise tax on sporting goods for the period of April 1, 1955, to December 31, 1955, assessed against and collected from plaintiff by William E. Frank, District Director of Internal Revenue for the District of Washington, at Seattle, hereafter called the District Director.

"2. Myron C. Miller made application for a patent on the device hereinafter referred to on August 9, 1944. The patent based on the application was granted on February 15, 1949, as United States Patent No. 2461755. No application for or further patent has been granted to Myron C. Miller in connection with the device in question.

"3. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Washington. Plaintiff was incorporated on April 16, 1954. Myron C. [60] Miller at all times mentioned herein has been and now is the majority stockholder of plaintiff.

"4. Plaintiff commenced manufacturing a de-

(Testimony of Willis B. Korff.)

vice known as Herring Magic on or about January 1, 1955, and commenced selling the device on or about March 7, 1955. This device is the subject of the patent mentioned above.

"5. Various sizes of the device were sold by plaintiff to jobbers, wholesalers and retailers at prices ranging from \$0.7875 to \$0.99 commencing March 7, 1955. This price structure has remained unchanged to and including all times relative to this suit.

"6. On or about May 1, 1955, Myron C. Miller, acting for plaintiff, made oral inquiry at the Seattle office of the District Director as to whether a manufacturer's excise tax was applicable to the sale of the device here in question. As a result of this inquiry the District Director's office notified the plaintiff on June 8, 1955, that the device was subject to the manufacturer's excise tax imposed by Section 4161 of the Internal Revenue Code of 1954. [61]

"7. Thereafter, plaintiff filed quarterly excise tax returns, Form 720, for the period from April 1, 1955, to December 31, 1955, and paid the following taxes on the dates and in the amounts as follows:

September 12, 1955.....\$ 567.72

November 8, 1955..... 1,738.08

January 20, 1956..... 17.55

Total\$2,323.35

"8. On or about January 18, 1956, within the time and in the form and manner required by law, plaintiff filed with the District Director its claim

(Testimony of Willis B. Korff.)

for refund of the excise taxes paid as aforementioned in the sum of \$2,323.35.

“9. By registered letter, received by attorneys for plaintiff on November 8, 1956, the District Director disallowed in full the claim for refund. No part of plaintiff’s claim for refund has been paid or refunded since that time.

“10. The plaintiff has borne the economic burden of the taxes for which it seeks refund and has complied with the provisions of Section 6416(a) of the Internal Revenue Code of 1954. [62]

“11. The only issue in this cause is whether plaintiff’s device is an ‘artificial lure’ within the purview of Section 4161 of the Internal Revenue Code of 1954.”

And I offer each of those stipulations as evidence in the plaintiff’s case in chief.

The Court: I would like to know whether the other side has made these stipulations.

Mr. Bowden: Your Honor, the defendant through Counsel has made those stipulations of fact.

The Court: And have you any objections to their being considered, that stipulation and those stipulations, as being part of the plaintiff’s case in chief?

Mr. Bowden: I have no objection, your Honor.

The Court: Let the record show that. The Court receives it as a part of the plaintiff’s case in chief. Does the plaintiff now again rest finally?

Mr. Riviera: Yes, your Honor, we do.

The Court: The plaintiff now rests. You may resume the defendant’s case in chief.

(Testimony of Willis B. Korff.)

Mr. Bowden: For purposes of the record, your Honor, I would like to again move to have this action dismissed on the ground that they have not presented a prima facie case. [63]

The Court: The Court reserves ruling. You may proceed.

Q. (By Mr. Bowden): You stated your name was Mr. Korff? A. Yes, sir.

Q. Would you please briefly——

The Court: How do you spell it?

A. K-o-r, two f's.

The Court: And the first name is what?

A. Willis. Middle initial B.

The Court: K-o-r double f-s?

A. Yes, sir—no "s".

The Court: You may proceed.

Q. (By Mr. Bowden): What is your occupation, Mr. Korff?

A. Fishing tackle manufacturer.

Q. And how long have you been engaged in that business? A. Since 1952.

Q. Where are you engaged in that business?

A. In the City of Seattle, Ballard.

Q. What is the nature and extent of that business, Mr. Korff?

A. I don't understand the question.

Q. Just exactly what do you do in your business?

A. I devise fishing lures and complete the construction, manufacture, marketing, and every aspect of the business.

(Testimony of Willis B. Korff.)

Q. Before 1952 had you any experience in the fishing industry or business? [64]

A. Yes, sir.

Q. And how long before 1952 were you engaged in this business?

A. Probably, oh, four years in the retail fishing tackle business.

Q. Do you fish, Mr. Korff? A. Yes, sir.

Q. How extensively?

A. I've fished nearly all my life since the age of six, which amounts to twenty-eight years since.

The Court: Was that sport fishing or some other kind?

A. Primarily sport fishing. I have three months of commercial salmon trolling, your Honor.

Q. (By Mr. Bowden): You say that you have manufactured lures. Have you ever invented what might be termed a fishing lure?

A. Yes, sir, I've invented one that's been acclaimed pretty much internationally and nationally. I have to advertise for myself a little there.

Q. Well, would you briefly describe just exactly what the nature of that device is, Mr. Korff?

A. It's a spinning, a spinning type of lure. It consists of a balsa body with bright fluorescent paint, flame orange in color, a spinner blade, swivel, and a treble [65] hook attached. The shape of the body, pear shaped, I can probably illustrate it with this large one here. Buoyancy tends to bring the body up, the blade swings underneath and the current of the river where you're fishing tends to pull

(Testimony of Willis B. Korff.)

back causing the blade to flash underneath, and each time the blade swings one way the body swings another, giving a mechanical action which is attractive to the fish. It's primarily used for steelheading in the Northwest, but they have discovered that it attracts fish nearly everywhere.

Q. How does that attract fish, do you know, Mr. Korff?

A. Well, probably three ways. One would be the flash of this blade. Another would be each time the blade swings it swings the body which gives it a wiggling motion, and the third one would be the bright fluorescent paint.

Q. What in your opinion, Mr. Korff, is necessary to constitute a lure? In other words, what is your definition of a lure?

A. My definition of a lure is a man made device created for the purpose of attracting fish and to assist in enticing these fish to strike and attach to our presented fishhook. This artificial attraction can be in the form of a brilliant flash, a mechanical action, a color, shape, an odor, or any other enticement characteristic or any combination of those.

Q. Now, more particularly, Mr. Korff, the cherry popper, what attributes of a lure does that have?

A. It has what I figure three, and I named those previous. One is this flash, one is the mechanical action and the third is the color.

The Court: I wish you to be reminded that he is

(Testimony of Willis B. Korff.)

referring to something that is not in evidence and I do not know whether it has even been marked.

Mr. Bowden: Yes, your Honor. At this time I'd like to have marked the three cardboards which are on Mr. Korff's desk as Defendant's Exhibit A, if your Honor please.

The Clerk: Defendant's A-1, A-2 and A-3.

The Witness: There are four of them here.

The Clerk: And A-4.

(Four cardboards containing displays of fishing lures were marked Defendant's Exhibits Nos. A-1, A-2, A-3 and A-4, respectively, for identification.)

The Court: Resume the interrogation.

Mr. Bowden: Thank you, your Honor.

Q. (By Mr. Bowden): Mr. Korff, would you kindly refer in your future testimony when you're speaking of any of those cardboards before you, would you kindly speak of those as Defendant's Exhibit A-1, -2, -3, however they [67] are marked, have been marked, and would you identify each one of those at this time and just state briefly what they purport to be?

A. This one is labeled A-3. It doesn't necessarily have to be in order?

Q. No, sir.

A. These are a tracker blade, gang trolls and flashers, just a few examples of a type of lure. These——

Q. You can go on to the next one at this time, Mr. Korff. We'll go back and go through them.

(Testimony of Willis B. Korff.)

A. All right. This one is A-4, consisting of flies, bugs, jigs, poppers and novelty type lures.

This one is A-1, the plug type of fishing lures.

This one is A-2, consisting of spoons and wobblers and the spinner type lures.

Mr. Bowden: Your Honor, I at this time move for introduction into evidence of Defendant's Exhibits A-1, -2, -3 and -4.

Mr. Riviera: No objection, your Honor.

The Court: Each of them is admitted, that is A-1, A-2, A-3, A-4.

(Defendant's Exhibits Nos. A-1, A-2, A-3 and A-4 for identification were admitted in evidence.)

The Court: It is not easy for the Court to [68] see what they have to do with this lawsuit, but maybe that will come out a little more later. The Court is trying this patented object as to whether or not it is a sport fishing lure, among other things. I did not know we were going to try all these other gadgets that have been mentioned in Seattle's trade. You may proceed.

Mr. Bowden: Thank you, your Honor.

Q. (By Mr. Bowden): With reference to Defendant's A-1, -2, -3 and -4, Mr. Korff, which you have before you, what are these particular items known as in the fishing trade in the Northwest?

A. They're all artificial fishing lures.

Q. Now would you please hold up Defendant's Exhibit A-1.

(Witness does as requested.)

(Testimony of Willis B. Korff.)

Q. Now, do any of those that you have said are artificial lures require the addition of anything so as to produce effectiveness as a lure?

A. There's probably, let's see, one, two, three, four, five, six,—six possibles.

Q. Now would you point to those, starting from the right to the left?

A. This one could require salmon eggs. This one requires a live bug placed inside, this one a herring strip, this one a whole herring, this one a whole herring and this one a herring strip. [69]

Q. All right. Now, if we may go on to the next exhibit, A-2, please. Are those known as lures in the fishing community, Mr. Korff?

A. Yes, sir.

Q. Do any of those require the addition of anything to make them effective as a lure?

A. This one requires a herring, generally a minnow. This one requires a worm and this one requires possibly some sort of natural bait food. This one may require salmon eggs, this one may require salmon egg juice, this one requires salmon eggs.

Q. Now may we go on to Defendant's Exhibit A-3, please. Now, in respect to that exhibit, Mr. Korff, do any of those require the addition of anything to make them effective as a lure?

A. Every one of these requires something.

Q. Let me put it another way to you, Mr. Korff. In your opinion does the requiring of something additional, does that detract from it being a lure?

(Testimony of Willis B. Korff.)

A. Certainly not.

Q. Now would you explain that briefly?

A. Well, for instance we'll take this large one. This is the trade name known as Kelp Cutter, kelp cutting having no bearing on the lure. It has a whirling motion which in turn causes a white flash which as it whirls and the [70] attached leader, regardless of whether we have herring or a spoon or anything shiny back here, as it whirls it causes the hook and the attached object to jump and as the fish comes—is attracted to this he sees this one and if he's hungry or is excited he might take it.

This type and this type have a different type of action. They have a sideways motion, and in turn a herring or a spinner or a spoon or something shiny may be attached to this one, except that the action is a little bit—not quite so strong.

These have no direct action. They merely—the attractor blades merely revolve on the shaft and fish are attracted by all these little flashes and come to see what it is, and the fisherman usually hangs maybe a worm or some very small hook back there with something baited or maybe a little fly or something, because the fish that are usually attracted to this type of lure are small, and they couldn't get this in their mouth but they would bite the little object behind it.

Q. So it's your opinion it's the flashing or the swirling action that causes the attraction?

A. Yes, sir.

Q. Would you go back now to Defendant's Ex-

(Testimony of Willis B. Korff.)

hibit A-1, which has the Herring Magic on it. Now would you point to what has been pointed out here as Plaintiff's Exhibit 1 [71] which is known as the Herring Magic?

A. This one is known as Herring Magic.

Q. Now, have you had occasion to use that in your fishing, Mr. Korff? A. Yes, sir.

Q. And have you had occasion to run certain tests with that particular device, Mr. Korff?

A. Yes, sir.

Q. I wonder if you would just very briefly explain to the Court the tests that you've run and the conclusions that you've reached.

A. The conclusion I've reached on Herring Magic is that if herring, or any properly shaped or size minnow, or piece of wood or other object if it's properly shaped, is placed in there and trolled, pulled through the water so that the scoop shape face will bring out the mechanical action, it will be caused to give a wiggling motion and in turn be an enticement to the fish.

Q. Well, is it the action—pardon me. What is it then in Herring Magic that attracts the fish?

A. Well, primarily the action, I would say.

Q. The action is caused by what?

A. Pardon me?

Q. The action is caused by what?

A. The little scoop in the front drawing against the water, [72] the water resistance.

Q. Now, is that similar in action to other types of lures? A. Yes, sir.

(Testimony of Willis B. Korff.)

Q. Other types that have been referred to on Defendant's Exhibit—

A. The reason I've referred to these lures as plug type is because of the unique shape of the face, which gives nearly each one that particular type of action. This plug has a scoop, this one has a scoop, this one has a scoop, they all have some sort of an inclination or a concave surface in the front so that when—and the line is usually attached in the center of that surface and when pulled through the water it gives—it's angle such that the water resistance causes it to turn or twist or whichever way they want it to act.

Q. So is it your testimony that it's the action which is caused which does the attracting?

A. Primarily.

Q. I see. Now, you've stated that in your opinion the Herring Magic is an artificial lure. What makes you come to that conclusion? In other words, how have you prepared yourself to come to that conclusion, Mr. Korff?

A. It's an artificial means of attracting the fish to that fishhook that's back there.

Q. Is it known in the community as an artificial lure? [73]

A. Definitely.

Q. What makes you come to that conclusion?

A. Oh, I've asked quite a—

Mr. Riviera: Objection, your Honor.

The Court: We cannot have what he said in the absence of other people, that is, people connected with this case.

(Testimony of Willis B. Korff.)

Mr. Bowden: I feel this way, your Honor: The witness can explain how he informed himself, whether he has read a book, whether he has had a personal experience, whether he saw a movie, whether he has——

The Court: He can say in round numbers without saying what he said and without saying what someone else said.

Mr. Bowden: Yes, your Honor.

The Court: He can say what he did, that is all, he cannot say what he or anyone else said.

Mr. Bowden: Fine. Thank you, your Honor.

Q. (By Mr. Bowden): Let's go back one moment in respect to your testimony as far as you actually using the Herring Magic as a—while fishing. Would you just explain briefly again the device that you used in testing Herring Magic? In other words, explain briefly what experiments you made with Herring Magic.

A. I tried it as recommended in the directions, and since [74] I am—I love to fish artificial lures in the complete so that there's no form of natural bait whatsoever connected, I ran a test with a piece of wood, and I found that I could get as good if not better action with the piece of wood.

Q. So in other words it's your opinion that it's the device which causes the attraction?

A. Well, the fish wouldn't bite the piece of wood dragged alone, but with the Herring Magic they would.

Mr. Bowden: You may inquire.

(Testimony of Willis B. Korff.)

Cross Examination

Q. (By Mr. Riviera): Mr. Korff, would you hold up the defendant's exhibit that has your own invention on it?

A. I have several inventions on this.

Q. I mean the one that you described in the very beginning.

A. The large one?

Q. Yes. Please hold it up so that I can see it.

(The witness did as requested.)

Q. Now would you point to your own invention?

A. This one, this one, this one, this one, this one, this one and this one.

Q. Well, those are so far away that I can't really discern any excepting the large one, the first one that you [75] pointed at. Is that the one you described first?

A. This large one is the first one we talked about.

Q. Yes. Now, doesn't the body—what would you call that, buoy?

A. Well, you could call it the body.

Q. All right, let's call it the body. Doesn't that body serve to attract the fish?

A. Certainly.

Q. Does the metal flasher underneath the body help in attracting the fish?

A. Yes, sir.

Q. And what is that below the metal flasher? That is on the line?

A. Here?

Q. Yes. What is that?

A. That's a swivel.

Q. That's a swivel, and nothing else beyond that?

A. No.

(Testimony of Willis B. Korff.)

Q. Will you hold up—what exhibit number is that, Mr. Korff? A. This is A-4.

Q. A-4. Would you hold up A-3?

(The witness did as requested.)

Q. Now, I can't see the term——

The Court: Take that and stand about in that [76] position.

Mr. Riviera: That's fine.

The Court: Go forward a little farther towards the table. Can you see it now?

Mr. Riviera: Yes, fine. Thank you, your Honor.

The Court: Can you see it, Mr. Bowden?

Mr. Bowden: Yes, your Honor.

(The witness moved to Counsel table.)

Q. (By Mr. Riviera): Mr. Korff, you call those things game trolls and flashers?

A. Gang trolls.

Q. Gang trolls. Now,——

A. They're also known under other names, too.

Q. Oh. What other names are they known as?

A. These are called herring dodgers, these are attractor blades, for their own trade name, or just trolls. There's quite a number of names, but it all boils down to the gang trolls or flasher or attractor blades.

Q. And they are called lures, aren't they?

A. Yes.

Q. And the color of each of the objects shown on Defendant's Exhibit No. 3, the color of the object participates or serves in the luring quality of the device, isn't that right? [77]

(Testimony of Willis B. Korff.)

A. Yes, sir, it helps, too.

Q. Now would you get Defendant's Exhibit A-2 and approach so one can see it.

(The witness did as requested.)

Q. Now, every one of the devices on Defendant's Exhibit A-2 has some color, doesn't it? Isn't that true?

A. Yes, sir.

Q. And everyone of those devices, of the devices shown on Defendant's Exhibit A-2, will produce some action in the water by itself, isn't that right?

A. Yes, sir,—“in itself,” you mean as trolls?

Q. Yes, when used in the water.

A. Yes, sir.

Q. All right. Now would you get Defendant's Exhibit A-1.

(The witness did as requested.)

Q. Now, in Defendant's Exhibit A-1 you have given the term “plug type” to the devices shown on Defendant's Exhibit A-1. Now, in the first row third from the left there is something which appears to be an imitation crab, is it, or——

A. Crawdan.

Q. A what?

A. Crawdan, a fresh water crustacian.

Q. Oh, that's an imitation of some natural form of bait?

A. Yes, sir. [78]

Q. Now, each one of the devices shown in the first row of Defendant's Exhibit A-1, they all have some color, don't they?

A. Yes, sir.

Q. Some discernible color?

A. Yes, sir.

Q. And each one of those also will produce some

(Testimony of Willis B. Korff.)

type of action in the water? A. Yes, sir.

Q. And the action that each one of those will produce in itself is attractive to fish, isn't that right? A. Yes, sir.

Q. Now would you step a little closer so that I can point to some. Now, the first seven in line—well, the second line, each of those has some color, isn't that right? A. Yes, sir.

Q. And each one of those when placed in the water will produce some action that is attractive to fish by themselves, isn't that right?

A. Uh-huh.

Q. Now if you'll get closer again. Number 8, which is a plastic type of plug, is in the form of a little—what would you call that, a little minnow?

A. A little minnow. [79]

Q. That is, in itself it looks like a minnow?

A. Yes, sir.

Q. And Number 9 is in the shape something like a cigar but it's oddly shaped, it has two flat surfaces, isn't that right? Would you call those flat surfaces? A. Planing surfaces.

Q. And that will also give some action in the water by itself? A. Yes, sir.

Q. Now, the last one on the second row, I think the trade name is Strip Rig, would you call that a fluorescent stripe on it?

A. It looks like fluorescent.

Q. And that's how it comes from the manufacturer? A. I believe so.

Q. And that fluorescent paint or stripe is at-

(Testimony of Willis B. Korff.)

tractive to fish, isn't it? A. Some fish.

Q. Some fish. That color or near that color is shown on some of the other plugs on this exhibit, isn't that right? A. Yes, sir.

Q. Now, the first one in Row 3, how do you describe this device?

A. That's a flexible type of plug with a semi-concave face which gives it a spinning motion on the order of these— [80] let's see, one, two—these three here.

Q. You say it is flexible. Do you mean that when—— A. No, it's flexible to the touch.

Q. Flexible to the touch?

A. Like a piece of cheese.

Q. And when drawn through the water will it have some action? A. That's right.

Q. And it has a color that is attractive to fish all by itself? A. Not necessarily.

Q. Is the color discernible? That is, can you describe—— A. Yes, it is.

Q. And do you think that color is attractive to fish?

A. This color was an experimental color. We don't know yet.

Q. Oh, it's an experimental color. Is that your own invention? A. Yes, it is.

Q. Oh, I see. Now, the second one in Row 3, isn't that a device formerly manufactured by a Martin Fishery Company? A. Yes, sir.

Q. And no longer manufactured?

A. I wouldn't know.

(Testimony of Willis B. Korff.)

Q. And then No. 3 is the Herring Magic and No. 4 in the third row, what is this called? [81]

A. That's a strip rig.

Q. Strip rig? A. Yes, sir.

Q. And does this device, this strip rig, have any action in the water by itself? A. A little.

Q. Attractive to fish?

A. Some fish may be attracted by it.

Q. There's a possibility?

A. It's not practicable, it wasn't intended for that.

Q. It has no color by itself?

A. Yes, sir. Well, not as much as the rest.

Q. It's a translucent plastic, isn't it?

A. Yes.

Q. What color would you call it?

A. I would call it a—it's a translucent—well, that's about all you can say, it's translucent as this one and as the other one I showed you had color up there.

Q. Now, the strip rig, the last one on Row 3, if placed in a jar of water similar to Plaintiff's Exhibit No. 13,—do you see Plaintiff's Exhibit No. 13, that jar over there? A. I saw it.

Q. That would give—you could see that strip rig which is the last one on Row 3 to about the same extent as [82] you can see the device in Plaintiff's Exhibit No. 13, is that right?

A. I believe not.

Q. You may take the stand again.

A. Which one did you want in there? There's two strip rigs.

(Testimony of Willis B. Korff.)

Q. Oh, no, I'm sorry, I didn't ask you to put it in there. I asked you to go back to the stand.

A. Oh, I'm sorry.

(The witness resumed the stand.)

Q. Now, a few moments ago you talked about the term artificial fishing lures. Is that the term everyone uses in describing these devices shown in Defendant's Exhibits A-1, -2, -3 and -4?

A. So far as I know, if it's properly expressed.

Q. Now, artificial fishing lures is quite a mouthful of words. Isn't it true that generally when referring to the general type of device shown on those exhibits the word "lures" is used? A. I don't.

Q. You don't. Do you do much fishing with just plain hooks? A. Yes, sir.

Q. Now I'm holding in my hand a large hook. Do you see it clearly? A. Yes, sir.

Q. And there's no particular difference between this type [83] of a hook and some of the hooks shown on the devices in your exhibits, isn't that right?

A. As far as principle of a fishhook.

Q. Yes, it's the same thing, an ordinary hook. Now, if you went fishing with just the hook at the end of the line, do you think you'd catch much fish?

A. I know a number of fellows that were arrested over last week end for doing that.

Q. Well, but would you go out fishing and use just a bare hook? A. No, sir.

Q. So the hook has no luring qualities, has it?

A. Yes, sir.

(Testimony of Willis B. Korff.)

Q. It has? A. Yes, sir.

Q. What are they? Just the hook alone.

A. The hook is—this hook is plated, nickel plated, which is shiny and which has luring qualities. Herring, when we catch herring for bait in the ocean, we use a little tiny single hook, about seven or eight of them on a line, drop it down and jig them up and down and the herring will run and grab that little hook, and we put the herring in the boat and use them for bait.

Q. Do you have any idea how far a fish can see in the water? A. Yes, sir. [84]

Q. About how far?

A. In clear water about thirty feet, some species.

Q. And in sea water?

A. In sea water, depending on the depth and the time of day and in what area. It's quite a lot shorter range of vision because sea water in the Northwest is full of vegetation, microscopic plants and animals.

Q. Now, as a general rule isn't it true that most people when fishing with a hook put some form of bait on the hook? A. Not necessarily.

Q. Well, it's not true, then, most people fish with just a bare hook?

A. You might make a replica of bait or you might put the actual living or natural food on there. Some people tie feathers on there and catch fish.

(Testimony of Willis B. Korff.)

Q. But most people if not all people put something else on the hook and fish?

A. Not entirely, as I explained about the herring.

Q. In your opinion, Mr. Korff, is a hook when used alone an artificial lure? A. It might be.

Q. Mr. Korff, a few moments ago you told us about an experiment you made. Do you have the device that you used to experiment with, do you have that with you? [85]

A. It takes considerable equipment.

Q. Well, you mean to make it or to use it?

A. To use it and to make it, et cetera.

Q. Well, what was it when you finished with it?

A. What was what?

Q. What was this wooden device you used with the Herring Magic?

A. It was just a little piece of wood I put inside to balance it.

Q. When using this piece of wood with the Herring Magic device, did the wood give any motion, produce any action? A. Did the wood?

Q. Yes. A. Yes.

Q. Do you think the wood gave the device altogether some luring qualities? A. It assisted.

Mr. Riviera: No further questions.

Redirect Examination

Q. (By Mr. Bowden): In your opinion, Mr. Korff, must a lure have all the qualities, namely color, shape, odor, sight, to constitute a lure?

(Testimony of Willis B. Korff.)

A. No, sir. It may have one or many. [86]

Q. What characteristic of a lure does Herring Magic have?

A. It has a mechanical action, some color by way of refraction of light, plus a flashy fishhook. Primarily the inherent quality in Herring Magic is the mechanical feature which is the scoop in front.

Mr. Bowden: No further questions, your Honor.

Recross Examination

Q. (By Mr. Riviera): Mr. Korff,—

Mr. Bowden: Excuse me. May he inquire further, your Honor?

Mr. Riviera: I take it I—

The Court: That is the penalty, often it is. I would certainly like the plaintiff to be accorded reasonable recross examination, since you have had redirect.

Mr. Riviera: May I continue?

The Court: I wish you to be as brief as possible, please, Mr. Riviera.

Mr. Riviera: Indeed I will, your Honor.

Q. (By Mr. Riviera): Mr. Korff, when the minnow is used with the Herring Magic, isn't it true that the flexible body of the minnow contributes in some manner to the luring qualities of the device as a whole? [87]

A. Not necessarily.

Q. Doesn't the tail of the minnow act as a stabilizer when in use?

A. It might to a certain point.

(Testimony of Willis B. Korff.)

Mr. Riviera: That's all, your Honor.

The Court: Anything else?

Mr. Bowden: No further questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Bowden: I'll call Mr. Miller as an adverse witness at this time, your Honor please.

The Court: That may be done. He will come forward and take the stand. He has already been sworn.

Mr. Bowden: I would like to have Defendant's Exhibit B marked for identification, please.

The Clerk: It will be Defendant's Exhibit No. A-5.

(A brown booklet was marked Defendant's Exhibit No. A-5 for identification.) [88]

MYRON CHARLES MILLER

recalled as an adverse witness by defendant, being previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Bowden): Will you identify that, Mr. Miller, Defendant's Exhibit B, please? Tell us what it is.

A. This is a brown booklet that we put in the hands of the dealers. It's free to the dealers to hand out to their customers, and it gives testimony inside of voluntary testimonials that have been

(Testimony of Myron Charles Miller.)

sent in to us by fishermen who have used the Herring Magic.

Mr. Bowden: I would like to offer Defendant's Exhibit B into evidence, your Honor.

Mr. Riviera: I have no objection. I think it has been marked Defendant's Exhibit A-5.

The Court: That is true, it has been, and as such A-5 it is now admitted.

(Defendant's Exhibit No. A-5 for identification was admitted in evidence.)

Mr. Bowden: I'm in error, your Honor. I should not have offered it. I didn't realize it had already been offered.

Mr. Riviera: No, I didn't say that.

The Court: You misstated yourself by referring [89] to it as "B."

Mr. Bowden: I'm sorry, your Honor. A-5, your Honor.

The Court: A-5.

Q. (By Mr. Bowden): Do you recall when that particular exhibit, Defendant's Exhibit A-5, was made available to the public, what year?

A. I'm not positive. I think it was 1956.

Mr. Bowden: No further questions, your Honor.

The Court: What do you call that A-5, that Exhibit A-5? What kind of a thing is it?

A. Your Honor, I believe this would be termed as a point of sale literature, is what it's usually referred to. It's free literature given out by the manufacturer.

The Court: Is it——

(Testimony of Myron Charles Miller.)

A. Promotional——

The Court: That is sufficient. Who usually distributes this?

A. Your Honor, our jobbers have these and they distribute them to the dealers and the dealers make them available on the counters for the fishermen.

The Court: Are there any further questions on anyone's part? Did you finish, Mr. Bowden?

Mr. Bowden: No further questions, your Honor.

The Court: Is there anything further by reason of these questions last asked?

Mr. Riviera: No, your Honor, there's nothing further in that respect. I should like to inquire of Mr.——

The Court: You would not be entitled to inquire now, would you?

Mr. Riviera: No, I would not.

The Court: Very well, the witness will step down.

(Witness excused.)

The Court: Call the defendant's next witness.

Mr. Riviera: I should like to call Mr. Miller as a rebuttal witness.

The Court: Do you have any further witnesses to call?

Mr. Bowden: No, I have no further witnesses, your Honor, but I have two things I would like to bring up, if I might, at this time.

The Court: Very well.

Mr. Bowden: If I erred and forgot to offer De-

fendant's Exhibits A-1, -2, -3 and -4, I would like to do so at this time.

The Court: They are already admitted according to my record. [91]

Mr. Bowden: Fine. Then the further matter is that a pretrial exhibit was served upon the Counsel for the taxpayer before this trial began in accordance with your Honor's order. I have nothing further to say in behalf of the defense, your Honor.

The Court: I have something before me called a memorandum of law.

Mr. Bowden: Yes, your Honor, that's the document that I served.

The Court: It was served and filed today.

Mr. Bowden: Yes.

The Court: You may now call proper rebuttal witnesses.

Mr. Riviera: Yes, your Honor. Mr. Miller.

MYRON CHARLES MILLER

recalled as a witness in behalf of plaintiff, being previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

Q. (By Mr. Riviera): Mr. Miller, does the minnow when used with the Herring Magic device contribute to the action of the device and the minnow in the water? A. Very definitely, sir.

Q. What portion of the minnow does so? [92]

A. The complete minnow.

(Testimony of Myron Charles Miller.)

Q. Does any particular part of the minnow act as a stabilizer?

A. Yes, sir, the entire body becomes a stabilizer.

Q. Mr. Miller, has the term "actionizer" acquired any wide use in the minds of the public?

A. Yes. It is referred to generally as the Herring Magic actionizer because of our television programs and our general mentioning it on our stationery, and so forth.

Q. You mentioned television programs. Do you advertise this device on television?

A. Oh, yes, sir.

Q. And how is it referred to on the program?

A. Well, it's referred to as a herring actionizer, an invisible device for putting live swimming action back in dead herring.

Q. Is there any other device on the market today that is using the term "actionizer"?

A. No, sir, not—well, using the term "actionizer"?

Q. Yes.

A. I believe there is one coming out on the market very soon that will use the word "actionizer."

Mr. Riviera: No further questions.

Mr. Bowden: No further questions, your Honor.

The Court: Step down.

(Witness excused.) [93]

The Court: Call the next witness.

Mr. Riviera: There are no further witnesses in rebuttal, your Honor.

The Court: Do you rest?

Mr. Riviera: We rest, your Honor.

The Court: Does the defendant rest?

Mr. Bowden: The defense rests, your Honor.

The Court: I wish to hear argument. Perhaps it might be well to take a short recess. How long do you wish to argue, Mr. Riviera?

Mr. Riviera: I should judge, your Honor, about twenty to thirty minutes.

The Court: How much time do you need, Mr. Bowden? Do you not think twenty minutes on each side is enough? It is not very——

Mr. Riviera: I should judge that would be about right, your Honor.

Mr. Bowden: I wouldn't expect to take more than twenty minutes, your Honor.

The Court: Each side may have twenty minutes, and you may divide yours between opening and closing for the plaintiff in such amounts as you wish.

Mr. Riviera: Very well, your Honor.

The Court: Court is now at recess for about ten minutes. [94]

(Short recess.)

(Thereupon, oral argument was presented to the Court by Mr. Riviera in behalf of plaintiff and by Mr. Bowden in behalf of defendant.)

The Court: From a preponderance of the evidence the Court finds, concludes and decides as follows:

That the completed functioning lure in question

here includes not only the device described in Plaintiff's Exhibit 1, but also the bait which it is hoped the lured fish will take. The completed functional thing, therefore, is that thing which, when cast into the water, serves to attract or allure the desired fish onto the hook. But the inanimate bait would not be activated so as to attract and allure the intended catch onto the hook in this instance without the work of plaintiff's actionizer. It is the thing which through manufacturing design artificially activates the inanimate bait as the result of the passing of the water over that thing's irregular surfaces, by which action of which thing the intended catch is lured onto that thing's hook. That device is the "artificial lure" taxed by the statute.

Therefore, it seems clear to the Court upon the evidence submitted during this trial the tax [95] collector for the Government is correct in holding that this is an artificial lure subject to the tax, and that plaintiff is not entitled to recover in this action and that the plaintiff should take nothing by his complaint herein.

(At 3:40 o'clock p.m., Tuesday, September 3, 1957, the hearing was adjourned.) [96]

[Endorsed]: Filed Sept. 16, 1957.

[Endorsed]: No. 15736. United States Court of Appeals for the Ninth Circuit. Herring Magic, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: October 8, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15736

HERRING MAGIC, a Washington corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS

Pursuant to Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, the appellant hereby designates the following as a statement of points upon which it intends to rely:

1. The United States District Court erred in finding as a matter of fact and concluding as a matter of law that plaintiff's device is an "artificial lure" within the purview of section 4161 of the Internal Revenue Code of 1954.

2. The United States District Court erred in granting judgment for defendant.

Dated this 9th day of October, 1957.

GARVIN, ASHLEY & FOSTER.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed Oct. 10, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the appellant, through its attorneys, Garvin, Ashley & Foster, and Daniel J. Riviera, and the respondent, through one of its attorneys, Charles P. Moriarty, United States Attorney for the Western District of Washington, that subject to the approval of the Court, all exhibits will be omitted from the printed record for purposes of appeal, but that said exhibits may be referred to by both parties in their briefs, at the hearing, and in argument before the Appellate Court, in all respects as though they were printed in the record.

Dated this 25th day of October, 1957.

GARVIN, ASHLEY & FOSTER,

/s/ DANIEL J. RIVIERA,

Attorneys for Appellant, Herring Magic, a Washington corporation.

/s/ CHARLES P. MORIARTY,

Attorney for Appellee, United
States of America.

[Endorsed]: Filed Nov. 8, 1957. Paul P. O'Brien, Clerk.

United States
Court of Appeals
FOR THE NINTH CIRCUIT

HERRING MAGIC, a Corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE APPELLEE

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FILED

FEB 14 1958

PAUL P. O'BRIEN, CLERK

**United States
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FOR THE NINTH CIRCUIT**

HERRING MAGIC, a Corporation,
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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
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HONORABLE JOHN C. BOWEN, *Judge*

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**United States
Court of Appeals
FOR THE NINTH CIRCUIT**

HERRING MAGIC, a Corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE APPELLEE

OPINION BELOW

The findings of fact, conclusions of law and opinion of the District Court (R. 15-19) are not officially reported.

JURISDICTION

This is a suit for refund of a federal excise tax. The tax was paid during the period from September, 1955, through January, 1956. (R. 18.) The claim for

refund was filed on January 18, 1956, and was rejected on November 8, 1956. (R. 18.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954 and on December 6, 1956, this suit was initiated (R. 12) by the taxpayer in the District Court for recovery of the taxes paid. Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on September 6, 1957. (R. 21.) Within sixty days, on September 16, 1957, a notice of appeal was filed. (R. 21.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly held that a device designed to attract fish by giving a natural-like swimming action to dead bait when drawn through the water was an artificial lure within the meaning of Section 4161, Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 4161. IMPOSITION OF TAX.

There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories of such articles sold on or in connec-

tion therewith, or with the sale thereof) a tax equivalent to 10 percent of the price for which so sold:

* * * * *

Fishing rods, creels, reels and artificial lures,
baits and flies.

* * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 4161.)

STATEMENT

Taxpayer, a Washington corporation, manufactured a device known as Herring Magic. A patent on this device had been obtained by taxpayer's majority stockholder. (R. 17.) The device was manufactured with an opening in which the head of the dead bait was placed and secured with a pin. A line with hooks was attached to the device. The hooks were secured to the dead bait by a body clamp which kept the hooks close to the bait at all times so that a striking fish would get the hooks as well as the bait. The device remained invisible when used in the water. (R. 15, 28.)

Various sizes of the device were sold by taxpayer to jobbers, wholesalers and retailers at prices ranging from \$0.7875 to \$0.99 commencing March 7, 1955. This price structure has remained unchanged during all times relative to this suit. (R. 17.) Taxpayer's majority stockholder inquired of the District Director

as to whether a manufacturer's excise tax was applicable to the sale of its device. As a result of this inquiry the District Director's office notified taxpayer on June 8, 1955, that the device was subject to the manufacturer's excise tax imposed by Section 4161. (R. 17-18.)

Thereafter, taxpayer filed quarterly excise tax returns, Form 720, for the period from April 1, 1955, to December 31, 1955, and paid the following taxes on the dates and in the amounts as follows (R. 18):

September 12, 1955.....	\$ 567.72
November 8, 1955.....	1,738.08
January 20, 1956.....	17.55

A timely claim for refund of the excise taxes paid was filed with the District Director. The District Director notified taxpayer by registered letter on November 8, 1956, that the claim for refund was disallowed. (R. 18.)

Taxpayer has borne the economic burden of the taxes for which it seeks refund and has complied with the provisions of Section 6416(a) of the Internal Revenue Code of 1954 (R. 18.)

The District Court sustained the District Director's rejection of taxpayer's claim for refund, holding that taxpayer's Herring Magic is a device which, through manufacturing design, activates the inani-

mate bait, that the activation of the inanimate bait lures the intended catch, and that the device is therefore an artificial lure within the meaning of Section 4161. (R. 15.)

SUMMARY OF ARGUMENT

Section 4161 imposes an excise tax upon sale by a manufacturer or producer of specified articles which include "Fishing rods, creels, reels and artificial lures, baits and flies." The statute does not define "artificial lures" and the words must be understood in their usual, ordinary and everyday meaning since a special meaning has not been indicated. That which is made or contrived by art or produced or modified by human skill and labor, sometimes as an imitation of something found in nature, is artificial as that term is ordinarily used and commonly understood. That which invites by the prospect of advantage or pleasure or entices is a lure as that term is ordinarily used and commonly understood.

Taxpayer's device was made or contrived by art and produced by human skill or labor. The device was designed for its single purpose of causing a natural-like swimming action imitative of live fish. This imitative swimming action was certainly an artificially produced enticement or lure for game fish. The device, therefore, comes within the ordinary and usual

meaning of the words artificial lure as used in Section 4161.

Appearance alone is not determinative of whether taxpayer's device is an artificial lure. The performance of an article is as much a part of the article as its appearance in determining its fitness. The only purpose of taxpayer's device is to activate an inert object — dead bait — in a manner imitating live fish. Taxpayer's device aptly performed this function. This performance is clearly to be considered in determining whether taxpayer's device is an artificial lure within the meaning of Section 4161, taken thereunder are designated in terms of their functional characteristics.

Accordingly, the District Court correctly held that taxpayer's device was an artificial lure within the meaning of Section 4161.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT A DEVICE DESIGNED TO ATTRACT FISH BY GIVING A NATURAL-LIKE SWIMMING ACTION TO DEAD BAIT WHEN DRAWN THROUGH THE WATER WAS AN ARTIFICIAL LURE WITHIN THE MEANING OF SECTION 4161, INTERNAL REVENUE CODE OF 1954.

Section 4161, *supra*, imposes an excise tax upon the sale by a manufacturer or producer of specified articles which include "Fishing rods, creels, reels and

artificial lures, baits and flies.” The tax involved here was imposed upon the ground that taxpayer’s device is an “artificial” lure within the meaning of Section 4161.

The statute does not define artificial lure and those words must be understood in their usual, ordinary and everyday meaning, since a special meaning is not indicated. *Old Colony R. Co. v. Commissioner*, 284 U.S. 552; *Crane v. Commissioner*, 331 U.S. 1. This is the pragmatic test applied by the District Court when it stated (R. 15):

The completed functional thing, therefore, is that thing which, when cast into the water, serves to attract or allure the desired fish onto the hook. * * * It is the thing which through manufacturing design artificially activates the inanimate bait as the result of the passing of the water over that thing’s irregular surfaces, by which action of which thing the intended catch is lured onto that thing’s hook.

As taxpayer points out (Br. 6), artificial is defined, *inter alia*, as follows (Webster’s New International Dictionary (Second ed., Unabridged)):

1. a. Made or contrived by art; produced or modified by human skill and labor, often as an imitation of something found in nature; — opposed to *natural*; as *artificial* heat or light, gems, salts, minerals, fountains, flowers, breeding.

* * * * *

2. Feigned; fictitious; assumed; not genuine.

Taxpayer's device was "Made or contrived by art" and "produced * * * by human skill and labor." The device itself, contrary to taxpayer's argument (Br. 7, 10-13), need not necessarily be an imitation of something found in nature. The definition explicitly recognizes that an artificial object may *often* be an imitation of something found in nature but that imitation plainly is not mandatory in order to come within the definition of the term artificial. Consequently, that taxpayer's device, merely as a physical object, may not, in appearance, be an imitation of something found in nature does not, as taxpayer contends (Br. 7), render the use of the term artificial in Section 4161 meaningless. The admitted purpose of the device is to cause a natural-like swimming action by dead fish. (Br. 3-4.) This was the only purpose of the device and certainly this effect was an imitation of something found in nature.

As taxpayer also points out (Br. 6), "lure" is defined, *inter alia*, as follows (Webster's New International Dictionary, *supra*):

2. That which invites by the prospect of advantage or pleasure; an allurement; enticement.

3. A decoy or bait for fish or animals; * * *

The exhibits demonstrate that taxpayer's device was commonly considered a lure as just defined. The

patent application filed by taxpayer's majority stockholder constantly described the device as a lure. For example, the patent application states (Pltf. Ex. 3):

This invention relates to a fish lure and, more particularly, to means for employment with a baiting minnow to impart lifelike motions and protect the same during trolling.

* * * * *

Having in mind the defects of the prior art, it is an important object of my invention to provide a fishing lure that is adapted to receive and retain a portion of a baiting minnow, and to impart, when drawn through the water, a life-like swimming and darting motion to the bait.

* * * * *

Still another object of the invention is to provide a fish lure for use with baiting minnows that imparts lateral movements to the bait, but is invisible to the fish sought to be attracted to the bait.

A further object of the invention is the provision, in a fish lure as set forth, of hooks, and hook-attaching means, which serve to retain the baiting minnow, as well as to catch the fish sought, without deleteriously affecting the baiting minnow.

A still further object of the invention is to provide in a fish lure of the type described, a releasable element for readily engaging the head of the baiting minnow and for retaining the same in proper associated manner with the luring device.

* * * * *

A fish lure, to overcome the defects hereinbefore enumerated, must have at least two totally distinct characteristics; it must be capable of

readily receiving and securely retaining by the head a baiting minnow; and it must also impart life-like motion to the baiting minnow without detracting from the normal luring qualities of the same as it is trolled through the water.

Taxpayer's advertising similarly constantly refers to the device as a lure. For example, the advertising states (Pltf. Ex. 4):

I am the new "hot lure" my boss kept so long for his own use — and for a few close friends.
 * * * Since then I've been shaped from many materials, in many sizes, and allowed to lure just about every kind of game fish I could find. * * *
 * * * * *

Herring Magic's patented actionizer is the only lure your money can buy that gives whole minnows the same natural swimming motions they would have if freshly crippled by feeding fish.
 * * *
 * * * * *

A good swivel on leader, opposite end from lure, is a "must" to avoid twisting, and to allow erratic swimming action.

These references — and there are many others in the exhibits¹ — unmistakably describe taxpayer's device as a lure. Taxpayer claims that these references are ambiguous. (Br. 8-10.) We submit that these references demonstrate the common understanding of

¹ See for example the testimony of taxpayer's majority stockholder at R. 52.

the word lure; the references demonstrate the intent to promote a common understanding that taxpayer's device was a lure as ordinarily defined above.

Accordingly, taxpayer's device was an artificial lure because it was a contrivance resulting from human skill and its intended single purpose — and practical utility — was to effect an enticement for game fish. The device, therefore, comes within the ordinary and usual meaning of the words artificial lure as used in Section 4161.

In using the words artificial lure in their ordinary and usual meaning, we submit that Congress was designating articles generically in terms of the functional characteristics of the article. It is of course correct, therefore, to consider the functional characteristics of the article, as the District Court did, in determining whether the article is an artificial lure.²

²The cases relied upon by taxpayer (Br. 11-12) are not controlling here. They involved the construction of tariff statutes where considerations which may not be appropriate here may be appropriate in construing the tariff statute. On the other hand, the tariff statute illustrates a designation in terms of functional characteristics. In *Morimura Bros. v. United States*, 8 Cust. & Pat. App. 111, 112, the statute designated "artificial and ornamental fruits" and "Feathers and downs". By way of contrast, in the same statute, the designation of "Feathers and

Compare *White v. Aronson*, 302 U.S. 16, 17-19; Rev. Rul. 54-320, 1954-2 Cum. Bull. 411.

Taxpayer seems to argue that imitative appearance alone is determinative of whether its device is an artificial lure. (Br. 7, 10-12.) Appearance alone, however, is not determinative. The performance of an article is as much a part of the article as its appearance. As was stated in *Hine v. United States*, 113 F. Supp. 340, 343 (C. Cls.), the use or practical purpose of an item as designed shows logically what the item is. See, also, *Samuel Winslow Skate Mfg. Co. v. United States*, 50 F. 2d 299 (C. Cls.), certiorari denied, *sub nom. Endicott, Trustee, v. United States*, 285 U.S. 555; *Union Pac. R. Co. v. United States*, 111 F. Supp. 266 (C. Cls.). There are many artificial lures for fish, such as "spoons," which do not resemble any natural fish food apart from their action when drawn through

downs, * * * when dressed, colored, or otherwise advanced or manufactured in any manner, and not suitable for use as millinery ornaments," is in terms of functional characteristics just as the designation in the same statute of "artificial or ornamental feathers suitable for use as millinery ornaments." It may be pointed out that in the *Morimura* case, p. 114, where the "*per se* character and not the ultimate or intended use" was controlling, the designation was "artificial or ornamental fruits" which was not in terms of functional characteristics which we contend is the nature of the designation involved in Section 4161.

water. The purpose of taxpayer's device is to activate an inert object — dead bait — in a manner imitating live fish by causing natural-like swimming. That swimming movement certainly is not natural movement of the dead fish; it is artificially produced movement feigning that of the natural and live fish.

In the final analysis, taxpayer's argument comes down to a contention that its device is not an artificial lure because a dead minnow must be used with it. But the dead minnow is not of itself a lure, whereas, on the other hand, the swimming action which taxpayer's device gives to the minnow makes the whole an artificial lure. The use of pork rind, for example, with other types of lures does not make them any the less artificial lures. In imposing an excise tax on a group of articles designated broadly as "Fishing rods, creels, reels and artificial lures, baits and flies," Congress could hardly have intended to make taxability depend upon technical distinctions as to how and why particular items fall within the stated categories.

Therefore, we submit that the District Court properly concluded (R. 15) that taxpayer's device—

is the thing which through manufacturing design artificially activates the inanimate bait as the result of the passing of the water over that thing's irregular surfaces, by which action of

which thing the intended catch is lured onto that thing's hook. That device is the 'artificial lure' taxed by the statute

The decisions relied upon by taxpayer are inapposite.³

³ Taxpayer cites and quotes from *California C. I. Ex. v. Indus. Acc. Com.*, 13 Calif. 2d 529, 90 P. 2d 289, and *Gould v. Gould*, 245 U.S. 151. (Br. 10, 14.) The *Gould* case involved the question of whether alimony payments constituted income to the wife and was deductible by the husband. In the *California C. I. Ex.* case the court was interpreting the state legislature's intent in the state's Workmen's Compensation Act which provided for compensation in the instance of injury to artificial members. This is clear from the Court's remark (13 Calif. 2d 529, 533, 90 P. 2d 289, 291):

"The legislature has only gone so far as to provide for compensation for injury to *artificial members*. Whether it may in the future seek to go beyond this point is not a proper question for our consideration at this time."

CONCLUSION

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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FEBRUARY, 1958.

No. 15736

In the United States Court of Appeals
for the Ninth Circuit

HERRING MAGIC, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*Appeal from the United States District Court for the
Western District of Washington
Northern Division*

HONORABLE JOHN C. BOWEN

United States District Judge

Brief for the Appellant

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In the United States Court of Appeals for the Ninth Circuit

No. 15736

HERRING MAGIC, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Brief for the Appellant

Numerals in parentheses refer to pages of the transcript of record unless otherwise stated.

JURISDICTION

Appellant's complaint seeks recovery of manufacturer's excise taxes assessed and collected from it under §4161 of the Internal Revenue Code of 1954 which imposes a tax on sporting goods. (3-12) Appellee's answer denies appellant's right of recovery. (12-14) The judgment dismissing appellant's complaint was entered September 6, 1957. (20-21) The notice of appeal was filed September 16, 1957. (21) The jurisdiction of this court rests upon 28 U.S.C. 1291.

THE QUESTION PRESENTED

A device is made of colorless, translucent plastic. It is designed to hold the head of a baiting minnow and to obtain reaction upon its curved surfaces from the

water through which it moves when trolled. When so used the baiting minnow will wriggle and swim. The device cannot be used without a baiting minnow.

Is such a device, in itself, an "artificial lure" within the purview of §4161 of the Internal Revenue Code of 1954?* (hereafter referred to as "§4161").

Appellant's answer is that the device is not an "artificial lure" within the meaning of the statute.

STATEMENT OF THE CASE

On August 9, 1944, Myron Miller applied for a patent on a device hereafter referred to as "Herring Magic" designed for use in fishing. The application was granted on February 15, 1949, as United States Patent No. 2461744. (73)

Appellant was incorporated in Washington on April 16, 1954. Myron C. Miller was then and is now appellant's majority stockholder. (73) Subsequent to appellant's incorporation, he assigned to it his Herring Magic patent. (32)

Appellant commenced manufacturing Herring Magic on or about January 1, 1955, and selling them on or about March 7, 1955. (73-74) On June 8, 1955, the District Director of Internal Revenue for the District of Washington notified appellant that an excise tax was applicable to the sale of Herring Magic under the provisions of §4161. (74)

*Set out in full in Appendix A.

Appellant filed the required tax returns and paid the following taxes on the dates indicated:

September 12, 1955.....	\$ 567.72
November 8, 1955	1,738.08
January 20, 1956	17.55
Total.....	<u>\$2,323.35</u> (74)

Within the time required by law appellant filed a claim for refund. (74-75) The claim was rejected in full. (75) This action followed.

At the trial below, it was stipulated, among other things, that the "only issue in this cause is whether plaintiff's (appellant's) device (the Herring Magic) is an 'artificial lure' within the purview of §4161 of the Internal Revenue Code of 1954." (75)

Herring Magic is made of colorless, translucent plastic and has a deep, concave cavity or headstall on one end and a "scoop shaped" face on the other. (Ex. 1) ** In use, the head of a minnow is placed in the cavity and fastened to it by means of a pin inserted through the minnow's head. Suitable hooks are attached to the underside of the minnow. (Ex. 2) The fisherman's line (with leader) is secured to a metal eye in the scoop-face. (Ex. 4)

When thus assembled and trolled through the water, the reaction of the water on the Herring Magic and

**Appellant's (plaintiff's) exhibits are numbered 1 through 13 inclusive. Appellee's (defendant's) exhibits are numbered A-1 through A-5 inclusive. See Appendix B.

minnow's body causes the minnow to wriggle and simulate live swimming movements. (50, 99, 100) Game fish are attracted to the minnow by its life-like action, as well as by its natural shape and scent. (57-58)

In use, Herring Magic is practically invisible so that the game fish see only the minnow moving through the water. (28, Ex. 13) Herring Magic, by itself, has no scent, does not resemble any natural food of game fish and has no color or other attractive features. (Ex. 1) *When used alone Herring Magic tumbles erratically, has no balance, and twists the leader up so that it cannot be utilized in fishing.* (51)

In the Herring Magic patent the words "lure" and "fish lure" were used. (Ex. 3) In the advertising used by appellant the word "lure" has been used. (Exs. 4, 5, 6, 7, A-5) Sometimes the terms refer to Herring Magic and sometimes to the device when attached to a minnow. The term "actionizer" is also used in the advertising material, but always to refer to Herring Magic. (Exs. 4, 5, 6, 7, A-5) Sport fishermen use either the word "lure" or "actionizer" to refer to Herring Magic, or use its full name to describe it. (Ex. A-5) The District Director describes Herring Magic as a ". . . bait holder . . . an article for holding fish used as bait . . ." (Ex. 9)

SPECIFICATIONS OF ERROR

1. The District Court erred in finding as a matter of fact and concluding as a matter of law that appel-

lant's device is an "artificial lure" within the purview of §4161. (11, 12)

2. The District Court erred in granting judgment for appellee. (20, 21)

These specifications of error will be argued together.

SUMMARY OF THE ARGUMENT

This appeal involves the construction of general language found in a tax statute. Neither the statute, §4161, nor any regulation defines exactly what is meant by "artificial lure." Appellant asserts that to be an "artificial lure" a device must, in itself, be imitative of some natural form of fish food or at least have some luring qualities found in natural food. Herring Magic is not such a device. It is a device that will hold the head of a baiting minnow and, when trolled, act as a hydrafoil—designed to obtain reaction upon its surface from the water through which it moves.

In appellant's advertising and in the Herring Magic patent, the use of the words "lure" and "fish lure" is ambiguous at best. Other terms have been used by appellant and various persons that accurately describe the device. In any event, the determination of whether or not the Herring Magic device falls within §4161 is a matter of law and all these terms are of little, if any, help. It is a bait holder.

ARGUMENT

Section 4161 of the Internal Revenue Code of 1954 provides:

"There is hereby imposed upon the sale by the manufacturer . . . of the following articles . . . a tax equivalent to 10 per cent of the price for which so sold:

. . .

"Fishing rods, creels, reels and artificial lures, baits and flies . . ."

One source for the meaning of the general language "artificial lures" is the dictionary. Webster's New International Dictionary, Second Edition (unabridged) defines the adjective "artificial" as follows:

"1. a. Made or contrived by art; produced or modified by human skill and labor, often as an imitation of something found in nature;—opposed to *natural*; as *artificial* heat or light, gems, salts, minerals, fountains, flowers, breeding . . .

"b. Made, esp. by a chemical process to resemble a raw material, or something derived from it; synthetic; as, *artificial* cotton or wool.

"2. Feigned; fictitious; assumed; not genuine. . . ."

The noun "lure" is defined:

"1. A contrivance somewhat resembling a bird, made of a bunch of feathers attached to a long cord, and often baited with raw meat,—used by falconers in recalling hawks.

"2. That which invites by the prospect of advantage or pleasure; an allurement; enticement.

"3. A decoy or bait for fish or animals; specif. a tassellike structure on the head of pediculate fishes . . ."

Webster does not define the combination of words

“artificial lure,” but does provide a definition for “artificial fly.”

“Artificial fly. *Angling*. A lure, used in fly casting, consisting of feathers, silk, wool, tinsel, etc., fastened to a fishhook by a silk-thread winding, generally in imitation of any of various flies, moths, caterpillars, etc.”

It would seem that the first meaning of “artificial” and the third of “lure” are applicable. Thus, an “artificial lure” is a thing which is itself (1) imitative of some natural form of food eaten by game fish and (2) attractive to fish. The object itself, the lure, must be an imitation of something, otherwise the modifier, “artificial,” would have no meaning.

The court did not find that Herring Magic, by itself, is either imitative of some natural form of food or attractive to fish. Rather, the court found that bait (the minnow) when used with a Herring Magic will lure fish. (15) With this appellant does not quarrel. But to conclude from such finding that Herring Magic itself is an artificial lure is a *non sequiter*.

A dead minnow has natural scent and is natural food for game fish. One may fasten a minnow to a line, without a rod, and drop it into the water *while standing on dock or rock*. The minnow hangs suspended in the water, its scent, filtering through the water, and its shape both act to lure passing game fish.

To improve on this, one uses a boat and trolls through the water. Now the minnow, being towed by its head,

appears to be moving through the water and the luring qualities of its scent and shape are more effectively utilized.

As a refinement lead weights (sinkers) and a modern fishing rod are added. With this, casting is facilitated, and the depth of the minnow regulated.

Each addition subsequent to the rodless cast from dock or rock serves to accentuate the luring qualities of the baiting minnow and employ them more effectively. Each step makes the bait better bait. Yet none would argue the boat, weights, or rod were artificial lures.

The Use of the Term "Lure" and "Fish Lure"

Great stress was laid by appellee on appellant's use of the word "lure" in its advertising and on Myron C. Miller's use of the words "fish lure" in his patent. An examination of the exhibits will demonstrate the ambiguous use of the term.

Exhibit 4 is a small flyer inserted in the Herring Magic box. On one side there is an imaginary letter from a Herring Magic to the fisherman. In the first paragraph the Herring Magic says, "I am the new 'hot lure'" But in the fifth paragraph it says, ". . . to feeding fish I'm the 'real McCoy' and must act exactly like the rest of the live minnows they eat every day . . ." Obviously the "I" in both paragraphs means the Herring Magic *and* the minnow. Below the letter the slogan "Naturally lures more fish, it's the real

thing” is shown over a sketch of Herring Magic attached to a minnow. The “real thing” is the minnow.

Exhibit 6 is a jobber sheet. At one place it reads “The only lure that gives fresh or frozen minnows the same . . . action of . . . live . . . minnows.” At another place it reads “. . . (Herring Magic) consistently out-fishes other top-rated lures because: it looks exactly like a . . . minnow . . .” Again an ambiguity, Herring Magic may give minnows action but *it* doesn’t look like one.

Exhibit 7 is a wholesaler type of advertising and has a place for the dealer to insert his own name or imprint. Exhibit 5, a counter display card, is a partial reproduction of Exhibit 7. Each reads “. . . Unlike other lures intended to resemble minnows, Herring Magic’s . . . actionizer . . . activates dead fish that anglers . . . often mistake it for a live minnow . . .” Herring Magic doesn’t resemble a minnow, so *it* couldn’t be mistaken for one. Here the word “lures” refers to the dead minnow when activated.

In Exhibit 3, the patent application, the inventor called his invention a “fish lure.” Yet, in referring to the use of a lure, he said:

“. . . In every instance the lure is intended to be drawn through the water and to have imparted to its motion actions resembling the natural swimming or darting action of the lesser fishes . . .”
Ex. 3, Col. 1, line 15.

The “lure’s” motions must refer to the motions of

the minnow if *it* is to resemble live bait. In the claims of the patent the invention is not referred to as a fish lure but always as a "trolling device."

The inventor has coined the term "actionizer" to describe Herring Magic. (37) So in Exhibit 6, on the sketch of the box appears "The Frantic Swimming Actionizer." Exhibit 7 states "... This Truly Revolutionary Actionizer Has Become the Favorite . . ."

Exhibit A-5, an advertising brochure, contains 21 letter testimonials. Of these 15 refer to the device as "Herring Magic," 3 as an actionizer and only 3 as a "lure."

To Be Taxable, a Device Must Be an Artificial Lure, *Per Se*

Where legislative bodies have enacted statutes concerning "artificial" objects, the courts have consistently held that to be within the statute, the object must be an imitation of the natural thing it represents.

In *California Casualty Indemnity Exchange v. Industrial Accident Commission of California*, 90 P.(2d) 289, 13 Cal.(2d) 529, the issue was whether eyeglasses were "artificial members" within the meaning of the California Workmen's Compensation Act which authorized compensation for "injuries to artificial members." The court stated the test to be—was the thing injured a substitute for, or a mere aid to some natural part of the body, and held:

"An artificial member must be held to be a

substitute for a natural part, organ, limb or other separable part of the body . . ." (at 90 P.(2d) 289, 13 Cal. (2d) 529)

Eyeglasses would make the eyes (a member) function more efficiently. Yet they are not "artificial members." Herring Magic will make the minnow (the lure) function more efficiently. It is not an artificial lure.

The test should be—is the device a substitute for (imitative of) natural bait, or is it a mere aid to the use of bait?

Morimura Bros. v. United States, 8 Ct. Cust. App. 111, involved the dutiable classification of objects resembling pears and apples under a statute imposing a duty on "artificial and ornamental fruits." It was urged that the proposed use of the articles (as pin-cushions) and not their *per se* character controlled their classifications. The court held the *per se* character was determinative, stating:

"In the (statute) the words 'artificial' and 'ornamental' are used conjunctively, modifying and qualifying among others the word 'fruits.' Inferentially, if not presumptively, these qualifying words were used by the legislature in the same limiting sense. It will not be questioned that 'artificial' relates to and qualifies the word 'fruits,' and was therefore used in a *per se* sense and not as indicating use. Any other view would be plainly inapt. Inferentially, if not presumptively, then, the conjoint word of qualification, 'ornamental,' was so used and refers to the *per se* character and

not the intended use of the fruit.” (at 8 Ct. Cust. App. 113)

In *United States v. Dieckerhoff*, 4 Ct. Cust. App. 384, it was held that if the object is not a “substantial simulation of the natural fruit,” it is not “artificial fruit” within the meaning of a statute imposing a duty on “artificial or ornamental fruits.” The court quoted from a similar case as follows:

“‘In order to be artificial fruit such articles should simulate the natural in form, color and outline to such an extent that they might readily be taken for the fruit they represent.’” (at 4 Ct. Cust. App. 386)

Accord: *United States v. Kresge Co.*, 12 Ct. Cust. App. 34.

An examination of §4161 shows that Congress has taxed very specific articles of sports equipment. No general classifications are described. In the case of rackets, racket frames, billiard and pool tables, golf bags, balls, clubs and sleds Congress has even stipulated a minimum length for the article before it is to be taxed!

The 1932 version of the statute taxed “games” and ended with the phrase “. . . and all similar articles commonly or commercially known as sporting goods.” §609, Revenue Act of 1932, 47 Stat. 264. The 1941 version taxed “fencing equipment” and “gymnasium equipment and apparatus.” §3406 (a) (1), Internal Revenue Code of 1939, 55 Stat. 716. Congress has elim-

inated the use of catch-all words such as "games," "sporting goods," "equipment" and "apparatus." It is difficult to believe that Congress intended the names of the taxable articles to be construed in any other but a *per se* sense.

The District Director, after consideration of the use and nature of Herring Magic, gave it the plain name "bait holder." (Ex. 9) Not a very grand term from the advertiser's viewpoint, but quite appropriate. His definition of what it is "... an article for holding fish used as bait . . ." is as satisfactory as any. (Ex. 9)

Mr. Korff, appellee's witness, testified that all the articles on Exhibits A-1, A-2, A-3 and A-4 were artificial fishing lures. (80) It is obvious on examination that all the articles on these exhibits, with the exception of the Herring Magic device (Ex. A-1, No. 3, row 3) and the "strip rig" (Ex. A-1, No. 4, row 3), have color and will produce some attractive motion when used by themselves. (Even the strip rig can be used by itself, to some degree. (91)) What he failed to realize is that the Herring Magic device is a departure from traditional methods of fishing. Designed to be invisible in use, its purpose is to create a reaction from the flow of water over its surfaces and cause a baiting minnow to appear alive. When so used all the luring qualities of the baiting minnow are enhanced and, it is hoped, productive of a good catch.

Tax Classifications Are Strictly Construed

It is fundamental that tax statutes are strictly construed and that doubts are resolved in favor of the taxpayer.

“In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the government, and in favor of the citizen.”

Gould v. Gould, 245 U.S. 151, 153, 62 L. Ed. 211, 213.

In *White v. Aronson*, 302 U.S. 16, 82 L. Ed. 20, the 1932 version of the statute here involved was under consideration. That statute imposed a tax on “. . . games and parts of games . . .” The government contended that jig saw puzzles were within the statute, and maintained that the effort to arrange the pieces was for amusement and thus amounted to a game. The Supreme Court declined to hold that every instrumentality whose chief use was to afford amusement was a game, and held for the taxpayer, stating:

“When there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. . . . Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them . . .” (at 302 U.S. 16, 20, 82 L. Ed. 20, 23)

By judicial construction the District Court has enlarged the statutory term "artificial lure" to mean "fishing tackle."

CONCLUSION

The plain meaning of the term "artificial lure" within the purview of §4161 is an article which in itself is imitative of some natural form of game fish food and is attractive to fish. Herring Magic is a device which will enhance the luring qualities of a natural form of game fish food—a baiting minnow. The device is not an artificial lure.

Respectfully submitted,

THOMAS B. FOSTER
DANIEL J. RIVIERA of
GARVIN, ASHLEY & FOSTER
1725 Exchange Building
Seattle 1, Washington
Attorneys for Appellant

APPENDIX A

Section 4161 of the Internal Revenue Code of 1954,
68A Stat. 489, 26 U.S. C. A. 4161

SPORTING GOODS

Sec. 4161. IMPOSITION OF TAX

There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) a tax equivalent to 10 per cent of the price for which so sold:

Badminton nets, rackets and racket frames (measuring 22 inches over-all or more in length), racket string, shuttlecocks and standards.

Billiard and pool tables (measuring 45 inches over-all or more in length) and balls and cues for such tables.

Bowling balls and pins.

Clay pigeons and traps for throwing clay pigeons.

Cricket balls and bats.

Croquet balls and mallets.

Curling stones.

Deck tennis rings, nets and posts.

Fishing rods, creels, reels and artificial lures, baits and flies.

Golf bags (measuring 26 inches or more in length) balls and clubs (measuring 30 inches or more in length).

Lacrosse balls and sticks.

Polo balls and mallets.

Skis, ski poles, snowshoes and snow toboggans and sleds (measuring more than 60 inches over-all in length).

Squash balls, rackets and racket frames (measuring 22 inches over-all or more in length) and racket string.

Table tennis tables, balls, nets and paddles.

Tennis balls, nets, rackets and racket frames (measuring 22 inches over-all or more in length) and racket string.

APPENDIX B—EXHIBITS

<i>Appellant's Exhibits Nos.</i>	<i>Identified At Record Page</i>	<i>Offered & Received At Record Page</i>
1	28	30
2	29	30
3	31	32-33
4	33	34
5	38	38
6	38	39
7	41	43
8	42	43
9	42	43
10	43	43
11	43	43
12	47	48
13	46	48

*Appellee's
Exhibits Nos.*

A-1	80	80
A-2	80	80
A-3	79	80
A-4	80	80
A-5	96	97

No. 15737

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

PETE JOHNSON, F. DOUGLAS MAJOR,
JANE KENDLE MAJOR, NELSON T.
BRUCE and CLEO BRUCE, Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

FEB 13 1958

PAUL P. O'BRIEN, CLERK

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UNITED STATES OF AMERICA,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellees.

United States District Court, Western District
of Washington, Northern Division

Civil Action No. 4133

PETE JOHNSON, F. DOUGLAS MAVOR,
JANE KENDLE MAVOR, NELSON T.
BRUCE and CLEO BRUCE, Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

PRETRIAL ORDER

As a result of pretrial conferences heretofore had, whereat the plaintiffs were represented by Arthur E. Simon and the defendant by Charles P. Moriarty, United States Attorney for the Western District of Washington, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

I.

That under Title 28, United States Code, § 1346 (a)(1), and under Title 28, United States Code, § 1402(a), this Court has jurisdiction of the causes of action set forth in the complaint of the plaintiffs herein.

II.

That at all times referred to in the complaint, all of the plaintiffs were residents of the Western District of Washington.

III.

That after June, 1946 and at all times herein referred to the plaintiffs Pete Johnson, F. Douglas Mavor and Nelson T. Bruce were partners doing business under the firm name and style of "Johnson & Mavor Logging Company." That the plaintiff Pete Johnson was at all times mentioned in the complaint an unmarried man, but that plaintiff Cleo Bruce was at all times mentioned in the complaint the wife of Nelson T. Bruce, and plaintiff Jane Kendle Mavor was at all times referred to in the complaint the wife of plaintiff F. Douglas Mavor. A copy of this agreement of limited partnership is attached hereto as Pretrial Exhibit A.

IV.

Said partnership filed a federal partnership return of income and Forest Industries Schedule, Form T, for the period from March 1, 1947, to February 29, 1948, reporting ordinary net income of \$11,163.26 and net long term capital gain of \$11,921.66. Individual separate and joint income tax returns were filed which included the partners proportionate share of partnership income. The income taxes shown due on said returns were paid. A copy of both the said partnership return and Form T are attached as Pretrial Exhibit B.

V.

The said Johnson & Mavor Logging Company was engaged in the business of logging. On or about

July 23, 1946, a written "Agreement" was entered into between the partnership and Puget Sound Pulp & Timber Co., a copy of which is attached as Pretrial Exhibit C.

VI.

That during the period from March 1, 1947, to February 29, 1948, Johnson & Mavor Logging Company cut approximately 5,093,640 board feet of timber from the property covered by the agreement (Pretrial Exhibit C); reporting net long term capital gains in the amount of \$11,921.66 on the federal partnership return filed for the period. Said partners reported their respective shares of these gains and paid income taxes thereon at the applicable rates.

VII.

That an Internal Revenue agent made an examination of said returns, that the reports of the Revenue agent asserted deficiencies of income tax for the calendar year 1948 in the total of \$3,477.27, which was based on the inclusion of \$23,843.31 derived from the contract with Puget Sound Pulp & Timber Co. as ordinary income instead of as long term capital gain under Section 117(k) of the Internal Revenue Code of 1939, as reported by plaintiffs.

VIII.

That on June 5, 1952, the Commissioner of Internal Revenue, in accordance with the said reports, assessed deficiencies against the plaintiffs which were paid as follows:

	Paid	Tax	Interest	Total
Nelson T. Bruce	4/23/52	96.00	17.92	113.92
Cleo Bruce	4/23/52	96.00	17.92	113.92
F. Douglas and Jane Mavor	4/23/52	1,016.06	189.73	1,205.79
Pete Johnson	4/23/52	2,269.21	423.74	2,692.95

IX.

Timely and proper claims for refund of these amounts were filed.

Plaintiffs' Contentions

I.

That the contract between plaintiffs and Puget Sound Pulp & Timber Co. gave plaintiffs the contract right to cut timber for sale, which right was held for more than six months and entitled plaintiffs to elect to treat the cutting thereunder as a sale or exchange under the provisions of Section 117(k) of the Internal Revenue Code of 1939.

II.

That the plaintiffs properly exercised the right so to elect and they are entitled to recover in accordance with the prayer of the complaint.

Defendant's Contentions

I.

That the contract between plaintiffs and Puget Sound Pulp and Timber Co. did not convey an interest in the timber cut under the agreement so as to entitle plaintiffs to elect to report the gain from

logging operations as capital gain under Section 117(k) of the Internal Revenue Code of 1939.

II.

Accordingly, plaintiffs are not entitled to refunds in this case and their complaint should be dismissed.

Issue

Whether the contract dated July 23, 1946, and performance thereof were sufficient to establish for the purposes of Section 117(k) of the Internal Revenue Code of 1939 that timber was cut (for sale or use in the taxpayers' trade of business) during the period from March 1, 1947, to February 29, 1948, and whether they owned or had such contract right to cut such timber for a period of more than six months prior to March 1, 1947.

Exhibits

The exhibits of all parties were produced and marked, and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. Each party waives objection that any such exhibit is a copy rather than an original.

A. Agreement of limited partnership dated June 24, 1946.

B. Partnership return of income for year ending February 29, 1948, and Form T.

C. Agreement dated July 23, 1946, between Johnson & Mavor Logging Company and Puget Sound Pulp & Timber Co.

Action by the Court

The foregoing Pretrial Order has been approved by the parties hereto, as evidenced by the signatures of their counsel, and this Order is hereby entered, as a result of which the pleadings pass out of the case, and this Pretrial Order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

Dated at Seattle, Washington, this 24th day of December, 1956.

/s/ GEO. H. BOLDT,
United States District Judge.

Approved as to form only:

/s/ ARTHUR E. SIMON,
Attorneys for Plaintiffs.

/s/ ALLEN A. BOWDEN,
Attorney for Defendant.

[Endorsed]: Filed January 24, 1957.

United States District Court
Western District of Washington

Chambers of George H. Boldt, United States District Judge, Tacoma, Washington.

June 13, 1957

To all counsel:

Re: Johnson v. U. S.—N.D. #4133.

Gentlemen:

At the conclusion of the trial in the above cause the court, upon stipulation of counsel, withheld de-

cision awaiting the disposition by the Court of Appeals of the case of Ellison v. Frank, S.D. #1938. The Ellison case has now been decided (Ellison v. Frank No. 15318, May 27, 1957).

Nothing in the Ellison opinion militates against my tentative intention to grant the relief prayed for by the plaintiff in this instance. Counsel for the plaintiff may submit appropriate findings of fact, conclusions of law and judgment and notice the same for hearing on a date convenient to counsel.

Very truly yours,

/s/ GEO. H. BOLDT,

George H. Boldt,

United States District Judge.

Wright, Innis, Simon & Todd

Mr. Charles P. Moriarty

Mr. Allen Bowden

Mr. Thomas R. Winter

Clerk

[Endorsed]: Filed June 14, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered, that this matter came on duly and regularly for hearing on January 24, 1957, before Honorable George H. Boldt, United States District Judge, sitting in the above Court, without

a jury; and the plaintiffs appearing in person and being represented by Arthur E. Simon, of Wright, Innis, Simon & Todd, their counsel, and the defendant being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington; and both sides having submitted their evidence and having rested; and the Court having heard the argument of counsel, and having taken the said matter under advisement, and having heretofore, on June 13, 1957, advised all counsel of the decision of the Court, and having directed the preparation of Findings and Judgment, and being in all things fully advised; Now, Therefore, the Court does hereby make the following:

Findings of Fact

I.

That under Title 28, United States Code §1346 (a)(1), and under Title 28, United States Code, §1402(a), this Court has jurisdiction of the causes of action set forth in the complaint of the plaintiffs herein.

II.

That at all times referred to in the complaint, all of the plaintiffs were residents of the Western District of Washington.

III.

That after June, 1946, and at all times herein referred to, the plaintiffs Pete Johnson, F. Douglas Mavor and Nelson T. Bruce were partners doing business under the firm name and style of "Johnson & Mavor Logging Company." That the plaintiff

Pete Johnson was at all times mentioned in the complaint an unmarried man, but that plaintiff Cleo Bruce was at all times mentioned in the complaint the wife of Nelson T. Bruce, and plaintiff Jane Kendle Mavor was at all times referred to in the complaint the wife of plaintiff F. Douglas Mavor. A copy of this agreement of limited partnership was received in evidence herein as Plaintiffs' Exhibit 1.

IV.

That said partnership filed a federal partnership return of income and Forest Industries Schedule, Form T, for the period from March 1, 1947, to February 29, 1948, reporting ordinary net income of \$11,163.26 and net long term capital gain of \$11,921.66. Individual separate and joint income tax returns were filed which included the partners' proportionate share of partnership income for each of the plaintiffs herein. The income taxes shown due on said returns were paid. A copy of the said partnership return and of the accompanying Form T were received in evidence herein as Plaintiffs' Exhibits 2 and 3, respectively.

V.

That the said Johnson & Mavor Logging Company was engaged in the business of logging. On or about July 23, 1946, a written "Agreement" was entered into between the said partnership and Puget Sound Pulp & Timber Co., a copy of which was received in evidence herein as Plaintiffs' Exhibit 4.

VI.

That during the period from March 1, 1947, to February 29, 1948, said Johnson & Mavor Logging Company cut approximately 5,093,640 board feet of timber from the property covered by the said agreement, reporting net long term capital gains in the amount of \$11,921.66 on the federal partnership return filed for the period. Said partners reported their respective shares of these gains and paid income taxes thereon at the applicable rates.

VII.

That an Internal Revenue Agent made an examination of said returns, that the reports of the Revenue Agent asserted deficiencies of income tax for the calendar year 1948 in the total of \$3,477.27, which was based on the inclusion of \$23,843.31 derived from the contract with Puget Sound Pulp & Timber Co. as ordinary income instead of as long term capital gain under Section 117(k) of the Internal Revenue Code of 1939, as reported by plaintiffs.

VIII.

That on June 5, 1952, the Commissioner of Internal Revenue, in accordance with the said reports, assessed deficiencies against the plaintiffs which were paid as follows:

	Paid	Tax	Interest	Total
Nelson T. Bruce	4/23/52	96.00	17.92	113.92
Cleo Bruce	4/23/52	96.00	17.92	113.92
F. Douglas and				
Jane Mavor	4/23/52	1,016.06	189.73	1,205.79
Pete Johnson	4/23/52	2,269.21	423.74	2,692.95

IX.

Timely and proper claims for refund of these amounts were filed.

From the foregoing Findings of Fact the Court deduces the following:

Conclusions of Law

I.

That the contract between plaintiffs and Puget Sound Pulp & Timber Co. gave plaintiffs the contract right to cut timber for sale, which right was held for more than six months and entitled plaintiffs to elect to treat the cutting thereunder as a sale or exchange under the provisions of Section 117(k) of the Internal Revenue Code of 1939.

II.

That the plaintiffs properly exercised the right so to elect and they are entitled to recover herein in accordance with the prayer of the complaint.

Done in Open Court this 15th day of July, 1957.

/s/ GEO. H. BOLDT,
United States District Judge.

Presented by:

/s/ ARTHUR E. SIMON,
Of Wright, Innis, Simon & Todd,
Attorneys for Plaintiffs.

Approved as to Form and Notice of Presentation
Waived:

/s/ JOHN A. ROBERTS, JR.,
Asst. U. S. Attorney,
Of Counsel for Defendant.

[Endorsed]: Filed July 16, 1957.

In the United States District Court, Western
District of Washington, Northern Division

Civil Action No. 4133

PETE JOHNSON, F. DOUGLAS MAVOR,
JANE KENDLE MAVOR, NELSON T.
BRUCE and CLEO BRUCE, Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

Be It Remembered, that this matter came on duly and regularly for hearing on January 24, 1957, before George H. Boldt, United States District Judge, sitting in the above Court, without a jury; and the plaintiffs appearing in person and being represented by Arthur E. Simon, of Wright, Innis, Simon & Todd, their counsel, and the defendant being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington; and both sides having submitted their evidence and having rested; and the Court having heard the argument of counsel, and having taken

the said matter under advisement, and having heretofore, on June 13, 1957, advised all counsel of the decision of the Court, and being in all things fully advised, and the Court having heretofore made and signed written Findings of Fact and Conclusions of Law; Now, Therefore, in accordance with the aforesaid Findings of Fact and Conclusions of Law it is by the Court

Ordered, Adjudged and Decreed:

1. That the plaintiff Nelson T. Bruce do have and recover of and from the defendant, United States of America, the full sum of \$113.92, together with interest thereon at the rate of six per cent per annum from April 23, 1952, amounting to \$35.73 to this date.

2. That the plaintiff Cleo Bruce do have and recover of and from the defendant, United States of America, the full sum of \$113.92, together with interest thereon at the rate of six per cent per annum from April 23, 1952, amounting to \$35.73 to this date.

3. That the plaintiffs F. Douglas Mavor and Jane Kendle Mavor do have and recover of and from the defendant, United States of America, the full sum of \$1,205.79, together with interest thereon at the rate of six per cent per annum from April 23, 1952, amounting to \$378.16 to this date.

4. That the plaintiff Pete Johnson do have and recover of and from the defendant, United States of America, the full sum of \$2,692.95, together with interest thereon at the rate of six per cent per

annum from April 23, 1952, amounting to \$844.55 to this date.

5. That said plaintiffs do further have and recover of and from the said defendant, United States of America, their taxable costs and disbursements herein to be taxed by the Clerk.

Done in Open Court this 15th day of July, 1957.

/s/ GEO. H. BOLDT,
United States District Judge.

Presented by:

/s/ ARTHUR E. SIMON,
Of Wright, Innis, Simon & Todd,
Attorneys for Plaintiffs.

Approved as to form and Notice of Presentation
Waived:

/s/ JOHN A. ROBERTS, JR.,
Asst. U. S. Attorney,
Of Counsel for Defendant.

[Endorsed]: Filed and Entered July 16, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Pete Johnson, F. Douglas Mavor, Jane Kendle Mavor, Nelson T. Bruce and Cleo Bruce, Plaintiffs, named above, and to Arthur E. Simon and Wright, Innis, Simon & Todd, their Attorneys:

You, and Each of You, will please take notice that the defendant, United States of America, does

hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from those certain Findings of Fact, Conclusions of Law and Judgment signed on July 15, 1957, and filed in the above-entitled action on July 16, 1957, and from each and every part and the whole thereof.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ THOMAS R. WINTER,
Special Assistant to the Regional Counsel, Internal
Revenue Service.

[Endorsed]: Filed September 9, 1957.

[Title of District Court and Cause.]

DESIGNATION OF POINT ON APPEAL

To: Pete Johnson, F. Douglas Mavor, Jane Kendle Mavor, Nelson T. Bruce and Cleo Bruce, Plaintiffs, named above, and to Arthur E. Simon and Wright, Innis, Simon & Todd, their Attorneys:

* * * * *

Point on appeal on which the defendant, United States of America, expects to rely:

1. That the Court erred in holding that the agreement of July 23, 1946, providing for the purchase of stumpage, cutting thereof, and sale of logs back to the vendor gives the logger a proprietary interest in the timber to entitle them to the election

permitted under Section 117(k)(1) of the Internal Revenue Code of 1939.

/s/ CHARLES P. MORIARTY,
United States Attorney,
/s/ THOMAS R. WINTER,
Special Assistant to the
Regional Counsel.

[Endorsed]: Filed November 22, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 74(o) FRCP I am transmitting herewith the following original documents in the file dealing with the action, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed May 2, 1956.
2. Summons with Marshal's return thereon, filed May 7, 1956.
3. Answer, filed June 29, 1956.

4. Praecipe, Government, for subpoena in blank, (Rogers), filed 1-16-57.

5. Praecipe, Government, for subpoena in blank, (Sahlin), filed 1-23-57.

6. Pretrial Order, filed Jan. 24, 1957.

7. Marshals' Return on subpoena, Sahlin, filed 1-29-57.

8. Court Reporter's Transcript of Court's Oral Decision, filed 4-23-57.

9. Letter, Judge Boldt to counsel, dated June 13, 1957, re granting of judgment to plaintiffs, filed June 14, 1957.

10. Findings of Fact, Conclusions of Law, filed July 16, 1957.

11. Judgment, filed July 16, 1957.

12. Notice of Appeal, filed Sept. 9, 1957.

Plaintiff Exhibits numbered 1 to 5 inclusive, and Defendant Exhibit A.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by on or behalf of appellant for preparation of the record on appeal in this cause, to wit: Filing Notice of Appeal, \$5.00; and that said amount has not been paid to me for the reason that the appeal herein is being prosecuted by the United States.

Witness my hand and official seal at Seattle this 4th day of October, 1957.

[Seal]

MILLARD P. THOMAS,

Clerk,

/s/ By TRUMAN EGGER,

Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting herewith supplemental to the record on appeal herein, and as a part thereof, the following additional original documents in the file dealing with the action, to wit:

13. Order extending time for docketing action on appeal to ninety days from first date of notice of appeal, filed Oct. 15, 1957.

14. Order extending time within which to furnish points and designate record to Dec. 4, 1957, incl., filed Oct. 25, 1957.

15. Court Reporter's Transcript of Proceedings, filed Nov. 22, 1957.

16. Designation of Contents of Record and Point on Appeal, filed 11-22-57.

Witness my hand and official seal at Seattle, this 25th day of November, 1957.

[Seal]

MILLARD P. THOMAS,
Clerk,

In the District Court of the United States, Western
District of Washington, Northern Division

No. 4133

PETE JOHNSON, F. DOUGLAS MAJOR,
JANE KENDLE MAJOR, NELSON T.
BRUCE, and CLEO BRUCE, Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings taken in the above-entitled and numbered cause in the above-entitled court before the Honorable George H. Boldt, United States District Judge, on January 24, 1957, at the United States Courthouse, Seattle, Washington.

Appearances: On behalf of the Plaintiffs: Mr. Arthur E. Simon, Wright, Innis, Simon & Todd, Attorneys at Law, 1411 - 4th Avenue Building, Seattle, Washington. On behalf of the Defendant: Mr. Allen A. Bowden, Attorney, Department of Justice, Washington, D. C. [1]*

Proceedings

The Court: Are you ready with Johnson vs. United States?

Mr. Simon: Plaintiff is ready, your Honor.

Mr. Bowden: Defendant is ready, your Honor.

The Court: You may proceed.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

The Clerk: Plaintiffs' Exhibits 1, 2, 3, and 4 have been marked for identification.

Mr. Simon: If the Court please, I suppose I should make an opening statement. I think that this case makes possible the shortest opening statement of any case I have ever had the privilege of presenting in court.

I think the issue and the sole issue in the case under the pretrial order and under the trial memorandum, which have been prepared by Mr. Bowden and myself, is whether the contract which has been marked for identification as Plaintiffs' Exhibit 4, which was pretrial order Exhibit No. 3, creates in the plaintiffs any proprietary interest in the logs—in the timber or the logs, resulting therefrom, so that they were entitled to claim capital gains treatment of the sales price, the income [2] derived from what we contend to have been the sales of those logs pursuant to the terms of Section 117(k) of the Internal Revenue Code of 1939.

With that much of an opening statement I am prepared to call my first witness.

The Court: Do you wish to make a statement now, Mr. Bowden?

Mr. Bowden: I don't believe it necessary.

DOUGLAS MAVOR

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

(Testimony of Douglas Mavor.)

The Witness: Douglas Mavor, M-a-v-o-r.

Direct Examination

Q. (By Mr. Simon): Where do you live, Mr.

Mavor? A. I live in Seattle.

Q. And how long have you lived in this community? A. About 39 years.

Q. You are one of the plaintiffs in this action?

A. Yes, sir. [3]

Q. Mr. Mavor, I hand you what has been marked for identification as Plaintiff's Exhibit No. 1 and ask you whether you recognize that instrument?

A. Yes, sir, I do.

Q. It purports to be an agreement of limited partnership between Pete Johnson and Nels Bruce and yourself.

I will ask you whether the document was actually signed on the date it bears by the people whose signatures purport to have been appended thereon?

A. Yes, sir, that is correct.

Mr. Simon: I offer Plaintiffs' Exhibit 1 in evidence.

Mr. Bowden: No objection.

The Court: It is admitted.

(Thereupon Plaintiffs' Exhibit No. 1 for identification was received into evidence.)

Q. (By Mr. Simon): Handing you Plaintiffs' Exhibit 2 for identification, I will ask you, Mr. Mavor, whether you recognize that as a partnership return of income—I will ask you whether or

(Testimony of Douglas Mavor.)

not you recognize it as a photostatic copy of the partnership return of income for the period from March 1, 1947, to February 29, 1948, of Johnson and Mavor Logging Company?

A. Yes, that is correct. [4]

Mr. Simon: I offer in evidence Plaintiffs' Exhibit No. 2.

Mr. Bowden: No objection.

The Court: Admitted.

(Thereupon Plaintiffs' Exhibit No. 2 for identification was received into evidence.)

Q. (By Mr. Simon): Handing you what has been marked as Plaintiffs' Exhibit No. 3 for identification, I will ask you whether or not you recognize that as the schedule which was submitted with and is a part of the income tax return of Johnson and Mavor Logging Company, a partnership, which has just been received in evidence as Plaintiffs' Exhibit No. 2? A. Yes, this is the exhibit.

Mr. Simon: Offer Plaintiffs' Exhibit No. 3 for identification.

Mr. Bowden: No objection.

The Court: Received.

(Thereupon Plaintiffs' Exhibit No. 3 for identification was received into evidence.)

Q. (By Mr. Simon): Mr. Mavor, I have asked the Clerk to hand to you what has been marked as Plaintiffs' Exhibit No. 4 for identification.

I will ask you whether you recognize that as a photostatic copy of a contract entered into between

(Testimony of Douglas Mavor.)

[5] Johnson and Mavor Logging Company and the Puget Sound Pulp and Timber Company?

A. Yes, sir. This is the final form of our agreement with Puget Sound Pulp.

Q. And I will ask you whether you signed that instrument? A. Yes, sir, I did.

Q. The original of it? A. Yes.

Q. And whether it was actually signed by the parties on the date of the acknowledgment? It bears the acknowledgment of—

The Court: Well, it is in the admitted facts that it was.

The Witness: Yes, it was.

Mr. Simon: I offer Plaintiffs' Exhibit No. 4 for identification in evidence.

Mr. Bowden: No objection.

The Court: Admitted.

(Thereupon Plaintiffs' Exhibit No. 4 for identification was received into evidence.)

Q. (By Mr. Simon): Mr. Mavor, one of your partners in this partnership of Johnson and Mavor Logging Company is Mr. Nelson Bruce who sits here, and the other partner—the other active partner is Mr. Pete Johnson?

A. Yes, that is correct. [6]

Q. And by reason of the fact that you and Mr. Bruce are married, your respective wives have an interest in the operations of the partnership, is that right? A. That is correct.

Q. Mr. Pete Johnson was a bachelor at all times involved here? A. Yes.

(Testimony of Douglas Mavor.)

Q. Mr. Pete Johnson is ill and unable to attend this trial, as I understand it?

A. I understand that is correct.

Q. Now, will you tell us about this Plaintiffs' Exhibit 4? By that I mean prior to the execution of this contract, prior to this particular contract, Plaintiffs' Exhibit 4, had your partnership ever had any business relationships with the Puget Sound Pulp and Timber Company?

A. No, not prior to this contract.

Q. And will you tell us how this contract came to be executed between you and that company?

A. Going back over the thing, as I recall it, we wrote a letter to Puget Sound Pulp and Timber in approximately April of 1946, and we received a letter from Mr. Sahlin stating that he was definitely interested in our inquiry; that he would like to talk to us.

We went up to Bellingham, as I recall, my [7] partner, Pete Johnson and myself, and discussed the possibilities of logging for Puget Pulp.

In May of 1946 we looked over a logging show that was offered to us by the pulp company, and after a couple months of negotiations regarding the logging of the timber, the contract requirements, specifications, we finally entered into this document on the 23rd of July of 1946.

Q. Now, in connection therewith will you tell us whether this contract, Plaintiffs' Exhibit No. 4, was originally submitted to you in that form?

(Testimony of Douglas Mavor.)

A. It definitely was not submitted exactly in this form.

Q. Will you tell us, please, how the negotiations were conducted?

A. They were conducted mainly between myself and Mr. Saline, as I recall. The pulp company, Puget Pulp, submitted to us a copy of an agreement which covered the sale in logging of this specific tract of timber. There were certain paragraphs and stipulations in the original agreement that we objected to. One of the important ones was on the sale of the logs. It is my definite recollection that the first agreement contained clauses which gave the pulp company the option to purchase our logs should they so desire. For several reasons we did not like the working of this particular [8] writing, and at our insistence the final document was changed so that in our opinion the pulp company was committed to buy the logs had we the desire to sell.

Q. Now, as I understand it, then, the first draft of this proposed agreement was sent by Mr. Sahlin to you or delivered to you?

A. I would say I believe that is correct.

Q. And then you discussed some contemplated changes, and there was a second draft and maybe a third draft, and ultimately a draft was produced which was signed and became the instrument which is certified—or a photostatic copy of which has been introduced here as Plaintiffs' Exhibit 4?

A. That is correct.

(Testimony of Douglas Mavor.)

Q. Now, in the course of those negotiations, who physically prepared the form of the instruments, what lawyer, if any?

A. They were prepared by the attorneys of Puget Pulp, Mr. Evans and Mr. George Powell of their law firm.

The Clerk: Plaintiffs' Exhibit No. 5 has been marked for identification.

Q. (By Mr. Simon): Calling your attention to Plaintiffs' Exhibit No. 5 for identification, I will ask you if you recognize those sheets of paper which have all been bound together? [9] A. Yes.

Mr. Bowden: I don't believe I have seen that Exhibit 5. I object to any additional exhibits at this time.

The Court: Well, see what it is. Has it been identified?

Mr. Simon: Yes.

The Court: What is it?

Mr. Simon: It is a sheaf of papers, of typewritten pages.

Mr. Bowden: Your Honor, prior to this time I haven't had an opportunity to go over it.

The Court: What is it?

Mr. Simon: May I go off the record, your Honor?

The Court: Certainly.

(Thereupon a discussion off the record was held.)

The Court: Back on the record.

Q. (By Mr. Simon): Do you recognize Plain-

(Testimony of Douglas Mavor.)

tiffs' Exhibit 5, Mr. Mavor? A. Yes, sir.

Q. Will you tell us what in general—what all of those papers are?

A. They are revised paragraphs from early writings of the contract submitted to us by Puget Pulp and Timber Company. [10]

Q. By that do you mean that these are paragraphs from prior drafts which were revised in the final draft? A. That is correct.

Mr. Simon: Offer Plaintiffs' 5 in evidence.

The Court: All right. You will have an opportunity to examine them at recess and consider whether you want to object or not.

Mr. Simon: I understood Mr. Bowden said he had no objection.

The Court: I won't rule on it for now.

Mr. Simon: That is all. You may inquire.

Mr. Bowden: I have no questions at this time, your Honor.

The Court: That is all, Mr. Mavor. Step down, sir.

(Witness excused.)

Mr. Simon: The Plaintiff rests. [11]

CLAYTON E. ROGERS

called as a witness on behalf of the defendant, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Clayton E. Rogers. R-o-g-e-r-s.

(Testimony of Clayton E. Rogers.)

Direct Examination

Q. (By Mr. Bowden): Mr. Rogers, what is your occupation?

A. I am treasurer of Puget Sound Pulp and Timber.

Q. How long have you been treasurer of the Puget Sound Pulp and Timber Company?

A. Since 1951.

Q. What position did you hold prior to that time, Mr. Rogers?

A. Chief accountant and comptroller.

Q. For how many years prior to 1951 were you in that capacity? A. May 1, 1943.

Q. And were you the chief accountant when the agreement in question was executed?

A. That is right.

Q. Could you very briefly tell us the business of Puget Sound Pulp and Timber Company, please?

A. We are manufacturing pulp chemicals and logging.

Q. Would you explain very briefly what that entails? In other words, would you simply describe the operations very briefly?

A. Well, I suppose we would start with logging, and we require the logs from the woods to integrate into our manufacturing facilities for the manufacturing of pulp. The refuse from the pulp in turn is manufactured into chemical by-products for commercial purposes.

Q. And the end products are sold on the open market, is that correct? A. That is right.

(Testimony of Clayton E. Rogers.)

Q. Now, were you in the timber business prior to 1941? A. Do you mean me personally?

Q. Yes. Were you individually connected with the timber business prior to 1941? A. Yes.

Q. How many years prior to that time?

A. Well, I have been—I was raised in the business, but I would say that about 1928 was my first, shall we say professional introduction into the business, and that continued until about 1934 or '35. It was about that time that I left it and returned in 1943.

Q. It would be fair to say you are acquainted with the timber business? [13]

A. Reasonably so.

Q. I have had occasion to look at this contract which was entered in with your company and Johnson and Mavor, is that correct.

A. That is correct.

Q. And you probably during the course of your experience have had occasion to examine logging contracts in general or contracts involved in the timber business in general, is that correct?

A. Oh, yes.

Q. Now, would you explain briefly to the court the method used in disposing of timber? By "disposing" I mean in selling timber, and by that, if I may explain it further, one type of agreement would be where there is an outright sale of the property and the timber, is that right?

A. That is right.

(Testimony of Clayton E. Rogers.)

Q. Now, could you explain other methods of selling timber stumpage?

A. Well, there would be the method in which you retain the right to the land but were selling the trees that were aboard the land.

Q. And would you sell the trees on the land at a lump-sum figure? Would that be one method?

A. There is the method of doing it that way, yes. [14]

Q. And are there other methods involved or often times employed in this area?

A. Yes, there is. There is the extraction basis in which the purchaser of the timber would pay for all the timber that comes off on a measurement basis.

Q. And what is that particular method commonly referred to as? Is it pay-as-you-cut method?

A. Well, I imagine you could call it pay-as-you-cut method.

Q. Would that be proper in the business to refer to it in that manner?

A. Well, I don't think I ever heard that expression used. I heard the expression as pay-on-the-extraction basis, which is probably the same thing, or pay-on-the-water scale of the timber produced from certain lands, or the scale of the timber produced from land.

Q. Well, is the purpose of that agreement to purchase the timber at so many dollars per thousand scaled at a particular place? A. Yes.

Q. Well, are you familiar with any other method

(Testimony of Clayton E. Rogers.)

which is commonly employed for the sale of timber?

A. Well, as I say, the outright sale of the timber, the sale of the timber on the extraction basis, and sale of the timber on timber land as a single unit. [15]

Q. Now, under all three of those methods is it generally the practice under these agreements that the purchaser can dispose of that timber in any way, shape, or form, he desires after it has been cut?

Mr. Simon: I object to that as irrelevant and immaterial.

The Court: I would assume, counsel, that that would be dependent upon the particular contract in a given case. It is hardly a question that you can generally answer, is it?

Mr. Bowden: I think you are right, your Honor. Perhaps I can make it more precise.

Q. (By Mr. Bowden): In your opinion, under an agreement whereby a purchaser purchases the land and the timber, would there be any question in your mind that the purchaser could cut and dispose of that timber in any fashion he desired?

Mr. Simon: Same objection.

The Court: It seems to me that here we have got a question of law. It wouldn't be of much value to the court in any event. It is obvious that on a piece of property including the timber and land he can do with it what he wants if he pays for it.

Mr. Bowden: I will pass that question. [16]

(Testimony of Clayton E. Rogers.)

Q. (By Mr. Bowden): You are familiar with the Johnson-Mavor contract, is that right?

A. Yes.

Q. Under that contract you—you have read the requirements? A. Yes.

Q. Under that contract could Johnson-Mavor do anything but deliver that timber to you?

Mr. Simon: I object to that as calling for a conclusion of law.

The Court: Sustained. That is a question that the judge has got to decide.

Q. (By Mr. Bowden): Were any of the contracts sent to Johnson-Mavor?

A. Not to my knowledge.

Q. Would that have come to your attention if that had been the case? A. Yes.

Q. In the course of your duties?

A. Yes. It would come to my attention.

Q. Did Puget Sound Pulp and Timber Company pay the personal property taxes on the logs cut under this particular agreement?

Mr. Simon: I object to that unless it is specified where the logs were on the date of the [17] levy of the assessment.

The Court: That would have to be stated, of course. You had better clarify that before you get to the final answer.

If taxes were paid, then you can answer that in general. Were some taxes paid on these logs?

The Witness: I assume they were.

The Court: You assume?

(Testimony of Clayton E. Rogers.)

The Witness: I am assuming. I would have to look the records up.

Q. (By Mr. Bowden): You don't recall when you paid the taxes on any of this timber or not, is that correct?

A. I can't remember directly, sir, that we did or didn't.

Mr. Bowden: No further questions, your Honor.

The Court: Any cross examination, Mr. Simon?

Cross Examination

Q. (By Mr. Simon): Mr. Rogers, in connection with the various types of disposition by the owner of standing timber to which you have testified on your direct examination regardless of the form that those transactions take, it has been your experience, has it not, that if the vendor of the [18] timber owns other timber in the area, or if this is an extensive tract which will require a considerable period for removal of the logs, that in the contract of sale the owner customarily includes provisions to protect himself against improper logging practices and that sort of thing, is that not true? A. Oh, yes, that is true.

Q. Included in those customary provisions would be provisions that the grantee in the deed or the purchaser under the contract of sale on the stumpage basis would comply with forest regulations, that he couldn't sell or transfer his rights under this contract to a person without the consent of the owner, that he agreed to dispose of slash and

(Testimony of Clayton E. Rogers.)

abide by the rules and regulations of the State Department; those protective agreements and covenants likewise fixing the standard of logging and the providing for the delivery to a certain place for scaling and those things, where the price is based on stumpage, those provisions would customarily be included regardless of the form of the sale, wouldn't you say?

A. No, I wouldn't agree with that. I would say that if it is a contract in which the timber was being removed on a time basis and being paid for on a time basis, where the title to the land was remaining in the hands [19] of the owners, I think those would be customary procedures to have.

The Court: These security measures that Mr. Simon spoke of?

The Witness: Yes, sir. I think it would be customary under that type of condition. On the other hand, where the land and the trees were sold outright in fee, I don't imagine that there would be any reason for that type of procedure.

Q. (By Mr. Simon): My question presupposed what I had stated in the question before. What I had in mind was if the vendor retained substantial timber interests in the immediate vicinity. But for any purpose your answer was sufficient. I think that is all.

The Court: Is there anything further, Mr. Bowden?

Mr. Bowden: No further questions.

The Court: You are excused and may leave whenever you wish.

(Witness excused.) [20]

CARL V. SAHLIN

called as a witness on behalf of the defendant, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Carl V. Sahlin, S-a-h-l-i-n.

Direct Examination

Q. (By Mr. Bowden): Will you state your occupation?

A. I am logging manager for Puget Sound Pulp and Timber Company.

Q. How long have you occupied that position?

A. Since 1942.

Q. Mr. Sahlin, you have heard this question asked of Mr. Rogers and I will ask the same of you, in your experience in the timber business would you state the three general types of agreements entered into between purchasers and sellers of timber?

A. Outright sale of timber and land is one, or the sale of stumpage where the land is retained, and——

The Court: By “stumpage” you mean the sale of the timber?

The Witness: Sale of the timber where the land is retained, or the sale of timber commonly [21]

(Testimony of Carl V. Sahlin.)

called stumpage as it is taken off of the land, or being removed and logged and scaled.

Q. (By Mr. Bowden): I see.

The Court: In stumpage contracts the buyer gets the stumpage as of the time of the purchase, whereas in these time provisions, the third category, they are purchased as cut, is that the distinction?

The Witness: Yes.

Q. (By Mr. Bowden): In other words, as you cut, why, you become the owner of it, is that correct? A. Yes.

Q. You are familiar with the Johnson-Mavor Company? A. Yes.

Q. Do you know the business that they are in?

A. I know the business they were in.

Q. Well, excuse me. What business were they in in 1946, '7 and '8?

A. They represented themselves as loggers.

Q. And you heard Mr. Rogers state the business of Puget Sound Pulp and Timber Company. Would you agree with his explanation of that business? A. Yes.

Q. Now, would you tell us very roughly approximately how many million board feet of timber that Puget Sound now [22] owns, just very approximately?

A. We have lots of competitors in the business.

The Court: I think he just wants to get a general idea of the amount of quantity of timber that you people have.

(Testimony of Carl V. Sahlin.)

Q. (By Mr. Bowden): Would you say that your holdings are extensive? A. Yes.

Q. Were your holdings extensive in 1946?

A. Yes.

Q. Have you had occasion since 1946 to sell or otherwise dispose of any of your holdings?

A. Yes.

Q. Is it a common practice in your business—in the business of Puget Sound Pulp and Timber to sell some of its timber holdings?

Mr. Simon: I object to that as incompetent and immaterial.

The Court: I think it is.

Mr. Bowden: Perhaps it is a conclusion, your Honor.

Q. (By Mr. Bowden): You are familiar with the Johnson-Mavor contract that we have been discussing, is that correct, sir?

A. That was ten years ago. [23]

Q. You heard Mr. Mavor discuss negotiations that he had with you on this contract? Do you recall him discussing those? A. Yes.

Q. The contract which was finally executed which had been negotiated by you represented what you considered to be the terms of the contract when it was executed, is that correct? A. Yes.

Q. Now, under this contract one of the provisions—would you hand the witness Plaintiffs' Exhibit 4?

Now, is it your understanding that that paragraph requires Johnson and Mavor to deliver all

(Testimony of Carl V. Sahlin.)

logs cut to Puget Sound Pulp and Timber Company?

Mr. Simon: Just a moment. I object to that as calling for a conclusion of the witness on a matter of law.

The Court: Sustained. It must be sustained. It is the parol evidence rule, of course.

Mr. Bowden: Well, your Honor, his understanding of the agreement and how it was carried out I think is important to this particular proceeding. This witness is familiar with the exact operation under the contract.

The Court: I haven't precluded you from [24] going into the operation and what was actually done. You may go ahead with that. What this witness's understanding is, is not material.

Q. (By Mr. Bowden): Under the provisions of the contract were all the logs cut delivered to Puget Sound Pulp and Timber?

Mr. Simon: I object to the incorporation of the words "under the terms of the contract."

The Court: Delete that portion. You have asked the same question over again in a little different form.

Q. (By Mr. Bowden): All I am interested in finding out is whether Johnson and Mavor did deliver to you all the logs which were cut by them?

The Court: On the properties referred to in the contract. That is what he means.

The Witness: They did all of them to my knowledge.

(Testimony of Carl V. Sahlin.)

Q. (By Mr. Bowden): Do you have any knowledge of them selling any of that timber or those logs to anybody other than Puget Sound Pulp and Timber Company? A. No.

Q. Now, in these negotiations which Mr. Simon referred to, an option arrangement which had been discussed or talked about prior to entering into the agreement—do you [25] remember Mr. Mavor mentioning that? A. Yes.

Q. Now, do you recall any discussions or negotiations at which time you discussed an option arrangement of any kind?

A. I don't recall distinctly. It very well could have been because I negotiate and have hundreds of these contracts.

The Court: You don't recall one, but by that you don't mean to say there wasn't one, is that right?

The Witness: That is right.

Q. (By Mr. Bowden): What was the purpose of this agreement—strike that. What was the purpose of this agreement?

Mr. Simon: I object to that as calling for a conclusion of the witness on a matter of law.

The Court: The document has got to speak for itself for what its purposes were.

Mr. Bowden: I think you are right.

The Court: Then we are agreed.

Mr. Bowden: It is a little difficult to question on this document. It is, you might say, our contention that parol evidence should be allowed to ex-

(Testimony of Carl V. Sahlin.)

plain this document, explain what was intended by the parties and the ultimate [26] purpose which was attempted to be accomplished here. There are words in here which are, in our opinion, ambiguous.

The Court: Has that issue been raised? I don't see any issue of ambiguity raised.

Mr. Bowden: There is no issue of ambiguity, your Honor. All we are asking the witness——

The Court: If there is an issue of ambiguity, I would look and see if the thing was ambiguous and determine that as a preliminary for admitting parol evidence concerning it. However, in view of the fact that we have a non-jury trial here, I will allow you to make your showing on it and then consider what, if any, weight or effect is to be given to it. Go ahead.

Mr. Bowden: Thank you, your Honor.

Q. (By Mr. Bowden): I would like to ask you one question.

Were any other agreements entered into between you or your company and Johnson and Mavor in respect to the timber which is referred to in this particular agreement?

A. There was a letter—an amendment agreement pertaining to a certain clause in here in this agreement, not respective to timber but respective to payments due to increased wages. [27]

Q. Briefly, then, could you tell what that letter was all about?

(Testimony of Carl V. Sahlin.)

Mr. Simon: That is objected to as not the best evidence.

The Court: That is right. The letter itself would be the best evidence. If it can be shown not to be in existence——

Q. (By Mr. Bowden): Was there an agreement—any other agreement other than this and other than the letter that you refer to now, either oral or written, entered into between you and Johnson and Mavor?

A. As I recall, other than the final closing of the contract.

Q. So, in other words, this embodied the entire agreement between you and Johnson-Mavor, is that correct? A. Yes.

Q. Now, you mentioned the closing of this agreement. There was a subsequent agreement entered into in that respect, is that correct?

A. Where both parties agreed that they were not liable to each other when the contract was agreed upon to be completed.

Mr. Bowden: I would like to introduce this agreement for mutual release.

The Court: All right. Have it marked. [28]

The Clerk: Defendant's Exhibit A has been marked for identification.

Q. (By Mr. Bowden): Do you recognize that as a copy of the agreement entered into between your company and Johnson-Mavor? A. Yes.

Mr. Bowden: Do you have any objection to it?

Mr. Simon: If the Court please, my only objec-

(Testimony of Carl V. Sahlin.)

tion is that I don't believe it is material to any of the issues in the case.

The Court: It may not be, but I will admit it and consider what, if any, weight is to be given to it. It is admitted.

(Thereupon Defendant's Exhibit A for identification was received into evidence.)

The Court: What is it?

Mr. Bowden: Mutual release executed on December 8, 1950.

The Court: All right.

Q. (By Mr. Bowden): Would you please tell of any negotiations which led up to the entering of that agreement or what that agreement was a result of?

A. There was disagreement towards the end of the production of logs into the contract as to the price schedule that [29] was arrived at in payment for the logs by Puget Sound Pulp to Johnson and Mavor.

Q. Would you tell a little bit more about the conflicts that arose and what the resolution was?

A. Under the contract, as I recall, it used a general going market price for the Loggers Association price to base the amount of monies that we paid them for the logs, and during the course of administration of the contract and the logging of the timber, Johnson and Mavor maintained we did not pay them enough, and we finally resolved that we had not and paid them some more.

Q. So the purpose of that mutual release was to

(Testimony of Carl V. Sahlin.)

make the final payment under the contract, is that correct?

A. A final agreement for mutual release.

Q. Well, let me ask you one thing further, then. What exactly was that money paid for? Was it an additional payment or a final payment under the contract?

A. Well, it was a final payment under the contract as resolved from negotiations from a dispute that—as to what the market price of logs under the contract was, and they convinced us that we had not paid them enough, so we paid them some more, and they agreed to take that amount and we agreed to pay that amount.

Q. Briefly, it is a payment under the contract whereby you [30] revised or increased the payment for certain logs, is that correct?

Mr. Simon: I object to that as leading and suggestive and contrary to the facts.

The Court: I think it is leading. On that ground the objection will have to be sustained. Restate the question.

Q. (By Mr. Bowden): Precisely what was this payment for?

Mr. Simon: I object on the grounds that the witness has already answered that.

The Court: I am not clear what he had in mind because the contract, Mr. Sahlin, seems to provide a specific dollar price, so much per thousand for hemlock and so much for cedar and so forth.

(Testimony of Carl V. Sahlin.)

Mr. Simon: That is the stumpage, your Honor. The payment for the logs is later.

The Court: Where is that provided? What paragraph is that in, so much for the booming and rafting and so forth?

Mr. Bowden: Paragraph four, your Honor.

Mr. Simon: Paragraph five. Current market prices shall mean the prices paid——

The Court: All right. I understand.

Mr. Simon: As I understand it, if the court [31] please, this witness has already said that there was a dispute between the parties as to what the amount was, and they conceded finally that our contention was correct and their prior contention was wrong.

The Court: In other words, it was paid pursuant to paragraph five of the contract, I take it, which is the one that specifies the current market prices?

The Witness: Without distinctly reviewing those negotiations of some years ago, there were other things that entered into it that they were maintaining, and I don't recall the figures of how they resolved it or whether they were a part of this. Part of it, as I recall, was in regard to in case wages increased that there was a certain formula under the contract of how the certain payments were to be made, OPA stumpage prices and various other things, OPA log prices.

Q. (By Mr. Bowden): That was a culmination of a dispute over the prices to be paid to Johnson-Mavor, is that correct? A. Yes.

(Testimony of Carl V. Sahlin.)

Mr. Bowden: No further questions of this witness. [32]

Cross Examination

Q. (By Mr. Simon): As I understand it, there had been at the close of or immediately prior to the eighth day of December of 1950, a couple years after the transactions involved in the case, I may say to the Court, a dispute as to the prices which were payable to the Johnson and Mavor Logging Company for the logs sold by them to you under this contract, which has been admitted in evidence as Plaintiffs' Exhibit 4, and as a result of argument back and forth you finally resolved all of your differences and you paid them a certain sum and each party executed this release, which was a mutual release in evidence, that you had paid them all sums due and that you had no further claim against them? A. Yes.

Mr. Simon: That is all.

The Court: That is all, Mr. Sahlin. You may leave whenever you wish.

(Witness excused.) [33]

DOUGLAS MAVOR

called as a witness on behalf of the defendant, having been previously sworn, resumed the stand, and testified further as follows:

The Clerk: You have been previously sworn. Resume the stand, please.

Direct Examination

Q. (By Mr. Bowden): Mr. Mavor, were any of

(Testimony of Douglas Mavor.)

the logs cut under the agreement dated July 23, 1946, delivered to anyone other than Puget Sound Pulp and Timber Company by you?

A. Not to my knowledge.

Q. Were all logs in accordance with the agreement branded with the Puget Sound brand?

A. I would say to the best of my knowledge that not all of them were. Some of them were branded, perhaps, with our own brand, our own log brand.

Mr. Bowden: No further questions, your Honor.

Mr. Simon: That is all, Mr. Mavor.

(Witness excused.) [34]

HOWARD CONKLE

called as a witness on behalf of the Defendant, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Howard Conkle, C-o-n-k-l-e.

Direct Examination

Q. (By Mr. Bowden): Will you state your occupation?

A. My occupation is that of—sometimes I am termed an Engineering Revenue Agent, and at other times an Internal Revenue Agent, both being the same thing, synonymous.

Q. How long have you been engaged in this occupation?

A. I have been connected with the Internal Revenue Service since June of 1949.

(Testimony of Howard Conkle.)

Q. During the course of your duties did you have occasion to examine the partnership return of income filed by the Johnson-Mavor Logging Company for the fiscal year ended February 29, 1948?

A. I did.

Q. During the course of that examination did you have occasion to examine the contract entered into between Puget Sound Pulp and Timber Company and Johnson-Mavor? [35]

A. I did.

Q. During the course of your work in general have you had occasion to examine contracts entered into between timber owners, timber purchasers, and people in the timber business?

A. Yes. That is one of the purposes of our examination.

Q. And during the course of your work have you come to any observations in respect to agreements entered into between people interested in buying and people interested in selling timber?

Mr. Simon: I object to that as not a proper question.

The Court: I think the form of the question is objectionable. Rephrase it.

Q. (By Mr. Bowden): Would you please explain the general methods used to sell timber?

Mr. Simon: That is objected to as a repetition, if the Court please.

The Court: It is repetitious, but merely on that ground I wouldn't exclude it. Overruled. Go ahead.

Q. (By Mr. Bowden): You may answer.

A. I believe that explanation that has been given

(Testimony of Howard Conkle.)

previously is quite accurate. These transactions consist primarily of three types; one, is that type in which the land and [36] timber is sold outright; secondly, the type is that in which a timber deed is given by the seller to the purchaser of the property and the seller retaining the interest in the land only, and the third type which comes under, for example, Section 117(k)(1) is that type in which the timber is sold, the purchaser acquiring all of the interest in the timber at the time the timber is cut and pays for the timber as it is cut. In other words, that is what would be construed as a cutting contract of sale of the timber.

Q. Now, during the course of your examination you had occasions to examine the contract entered into between Johnson and Mavor and the Puget Sound Pulp and Timber Company, is that correct?

A. Yes.

Q. And during the course of your examination you also examined the partnership return, the return previously referred to, is that correct?

A. I might explain that the function of an Engineer Agent for the Internal Revenue Service is not an accounting function but it has principally to do with valuation problems, in some cases the treatment of contracts, so that in this case the thing that I was—the item which I principally was concerned with was the review of the taxpayers or the partnership and the partnership's [37] claim under Section 117(k)(1), and the other item I was principally concerned with was the depreci-

(Testimony of Howard Conkle.)

ation which was claimed on the return on the machinery and equipment.

Q. What was your concern of what you termed 117(k)(1)?

Mr. Simon: I object to that as irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Bowden): In examining into these matters that you have referred to, did you have occasion to examine the method used in reporting income received under the contract in question?

Mr. Simon: That is objected to as irrelevant and immaterial. There is a stipulation covering the facts with reference to it.

Mr. Bowden: All I want the witness to do is tell what the witness did during the course of his examination.

Mr. Simon: That is irrelevant and immaterial.

Mr. Bowden: I think it is very important, your Honor, to show the basis upon which this case is in this court right now.

The Court: Well, it is not clear to me. If there is some fact that he discovered about the situation that has some bearing on it, he can [38] tell us about that, but his reasoning or what he did apart from that, it seems to me that is irrelevant. We have but a single question presented here.

Mr. Bowden: Well, I concur with your Honor's statement.

The Court: If there is some information or fact that he came to learn that would have a bearing on

(Testimony of Howard Conkle.)

our problem, I don't want to preclude him from stating it. There is no use of going into details of what he did or didn't do.

Mr. Bowden: This witness will only testify what the result of his examination was.

Mr. Simon: That is objected to. That is covered by the stipulation.

The Court: We will hear it, and we will get on with it quicker that way. I won't pay any attention to it if it is irrelevant. Go ahead, please.

Q. (By Mr. Bowden): Please explain the adjustments that he recommended as a result of your examination.

A. The function of an Engineer Revenue Agent is——

Mr. Simon: I object to that as not responsive.

The Court: Respond to the question, Mr. Conkle, please. [39]

The Witness: Upon examination of the partnership return I discussed the case with Mr. Bruce, one of the partners, and with Mr. Martin. At that time a member of the accounting firm of Ernst and Ernst, Certified Public Accountants in Seattle, and I advised them since maybe—I better rephrase that.

It was necessary for me to suggest to them that I would be obliged to recommend that their claim under Section 117(k)(1) be disallowed. I also advised them of the reasons.

Q. (By Mr. Bowden): What were those reasons?

(Testimony of Howard Conkle.)

Mr. Simon: That is objected to as irrelevant and immaterial, and I move that the last answer be stricken.

The Court: I will let him answer, and we will get on with it quicker that way. If it is immaterial, and it sounds like it is, I will so treat it. Go ahead.

Q. (By Mr. Bowden): Very briefly explain your reasons and we will be on with it.

A. Briefly it has to do with these three types of sales, the lump sum purchase of timber and land owned, the purchase of standing timber only leaving the land in the owner's name, and what would be called in the [40] industry—and which is known in the industry as a cutting contract in which the timber stumpage is sold to a purchaser and the purchaser receives all of the right, title, and interest in the timber at the time of the felling, and he can sell the logs to whomsoever he pleases, and actually, if he desires to under what is known as a cutting contract in the industry, he can in turn engage in a second cutting contract and resell that standing timber. That is provided for in the '54 Code.

Mr. Simon: If the Court please, it seems to me perfectly obvious that this witness is giving a dissertation on what he regards as the law of timber sales generally.

The Court: It seems so to me, Mr. Simon, but up to now this is just all the witness's idea about it. In the last analysis my judgment about the ef-

(Testimony of Howard Conkle.)

fect of this contract and the law has got to be controlling.

Q. (By Mr. Bowden): There is no need to go on further with that. May I ask one further question. Your recommendation was based on your reading and understanding of this agreement, is that correct?

A. Yes, that is correct.

Mr. Bowden: No further questions. [41]

Mr. Simon: No questions.

The Court: Nothing further, Mr. Conkle. You are excused.

(Witness excused.)

The Court: Is there anything further?

Mr. Bowden: Nothing further, your Honor.

The Court: Well, if the evidence is concluded, I think I will take a short recess and then I will listen to you in argument.

(Thereupon a short recess was taken.)

(Thereupon oral argument of counsel was rendered.)

The Court: A very difficult question is presented. In the Ellison case the contract was at great pains to emphasize that the logger under no conditions or circumstances would have any title to the timber or the logs at any point in the operations.

I remember that the contract was drafted by Ed Eisenhower who apparently wanted to be real sure it would so provide because he put language in the contract about three or four different times and places to make it plain that under no conceivable

circumstances would the logger have any title to timber or logs. I think I am right in that, am I not? I haven't reviewed it or looked back at my decision or anything else, but that is my [42] recollection of it. I remember that I was impressed with that circumstance in rendering my decision after looking at *Carlin vs. Commissioner*, because *Carlin vs. Commissioner* made it plain that if it was a pure matter of rendering services, the logger wasn't entitled to the benefit of section 117(k)(1). Since in the *Ellison* case the logger under no circumstances ever had any title to timber, logs or lumber of any kind whatsoever, the only thing he could have been doing was to be rendering services. There was no other possible relationship between the owner of the timber and the logger under the terms of the contract and under the evidence presented.

Now, this case is quite different because here we have a contract that, to say the least of it, does not expressly and emphatically provide for non-title in the logger. However, the disappointed taxpayer, *Ellison*, is seeking a review of our decision in that case, and it may be that we were in error. Of course, if *Ellison* were reversed, there wouldn't be any argument in this case at all, would there? I mean this case much more nearly conforms to what the section calls for than *Ellison* did, and it may be that the Circuit Court will say I was wrong in *Ellison*. If they do, it looks to me like they are going to have to back up a [43] little bit on *Carlin* to do so, but that is not an insurmountable ob-

stance in an appellate court or any other one for that matter.

What I am thinking is this, I wonder if it wouldn't be better for the interests of all concerned if I held the decision in this case until Ellison is decided, because if Ellison is reversed, that is an end to this case and there is no use of worrying about it any further. If it is not reversed, there may be something said in the opinion that would be of some value in passing on the present case.

Now, I will go on from there to say this, that I have no doubt in my mind at all but what the pulp company in the present case was interested in getting its logs cut, and that essentially is what they were out for, was getting the timber cut on some kind of favorable basis by a reliable logger and so forth. So that if I could just decide the case simply on what essentially was desired and intended by the parties, I wouldn't find much difficulty in coming to that conclusion. However, that is not the basis on which the case has to be decided. In tax cases particularly, there is no use of talking about barnyard equity. There is none involved. It is just a question of what Congress has provided by certain language, which often is very difficult [44] to understand and follow. If the taxpayer's situation comes within the language, then he is in it. If he doesn't come within it, he is out of it. It doesn't make any difference how much I think he ought to be in or out. I don't concern myself with it. It is simply a question of does the

taxpayer come within the language of Congress or doesn't he?

In this particular case it appears very difficult to tell whether this taxpayer comes in within the language in question or not. I must say that the counsel drafting this contract, whom you did not identify but whom I am quite ready to agree are quite capable, have drawn a most artful contract in this situation. You can't escape the conclusion that at least for a little while, it is true under all kinds of safeguards, to some extent the logger has a proprietary interest in those logs. Precisely how long or to what extent, there is no need of considering because the section says, "If the cutting of timber for sale or use in the taxpayer's trade or business—" "during such year by the taxpayer who owns or has a contract right to cut such timber and has held the contract for a period of more than six months—" I assume the six months' factor is not in dispute is it?

Mr. Bowden: No, your Honor. [45]

The Court: Now, "cutting of timber for the sale or use in the taxpayer's trade or business." Well, it looks like Johnson and Mavor qualify under that language. Whether that is what Congress intended or not, that is what they said. I can't tell very much about that. I rather suspect that they didn't quite mean it that way, but they didn't say so.

Mr. Bowden: I would like to interrupt.

The Court: I am about finished with my ruminations.

Mr. Bowden: I might make one suggestion. I am looking forward to the Ninth Circuit opinion in Ellison. I don't mean to delay this case at all, but I do feel that this area needs some illumination, and this is what I would consider a fringe case. Maybe we are getting into that twilight area that requires the Ninth Circuit and maybe the Supreme Court, but I would have no objection if your Honor would care to hold this off until we did get a result in Ellison.

The Court: I must say that I lean towards holding for the taxpayers in this case because I do think that under this particular contract, granting that it was a masterpiece of circumlocution, nevertheless it does provide that at least under some conditions and to some extent or other, the logger has some proprietary interests [46] in the logs he cuts. It is hedged about with all sorts of provisions to protect the owner from any loss, that is true.

I rather think, Mr. Simon and Mr. Bowden, that the probabilities are that that Ellison case will be decided shortly because it is quite sometime ago now, I think, that it was ready for hearing. I don't know whether it has been argued. If Ellison gets reversed I won't have to strain on the present case at all, because that would be an end of it. If it doesn't get reversed, then I will decide this one, but I have a feeling at the present moment, and I am subject to change of mind, of course, that in this instance the taxpayer has come within the requirements of the section, although it is not, certainly, free from doubt.

Well, gentlemen, I think that at least for a reasonable period I will withhold decision because there is no use of putting either one of you to an appeal in this case if the Ellison decision is reversed. I think it best I hold this case for decision until we see what they say in the Ellison case, and so I will take the matter under advisement pending the disposition of Ellison. In the meantime, if Ellison goes on for any length of time without decision or you learn that there is likely to be any great delay in decision, I will not further delay decision of the present case. [47]

[Endorsed]: Filed November 22, 1957.

[Endorsed]: No. 15737. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Pete Johnson, F. Douglas Mavor, Jane Kendle Mavor, Nelson T. Bruce and Cleo Bruce, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: October 7, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*

v.

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MAJOR, NELSON T. BRUCE and CLEO BRUCE,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

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FILED

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United States Court of Appeals

For the Ninth Circuit

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KENDLE MAJOR, NELSON T. BRUCE and
CLEO BRUCE, *Appellees.*

No. 15737

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

JURISDICTION

We concur in Appellant's assertions concerning jurisdiction.

STATEMENT

Appellant's statement of the case requires some emendation.

Thus, at the outset, Appellant's counsel have missed the basic reason for the joinder of Mrs. Major and Mrs. Bruce as plaintiffs (B. 3, footnote 1). Actually the reason for their joinder was that as wives of members of a partnership composed of residents of the State of Washington, the distributive share of their husbands in the earnings of that partnership in the State was community income and half of it belonged to the wives. *Poe v. Seaborn*, 282 U.S. 101.

The contract between that partnership (Johnson & Major Logging Company) and the owner of the tim-

berland (Puget Sound Pulp & Timber Co.) was negotiated between strangers, dealing at arm's length (R. 26). It is undisputed that the drafts of the proposed written instrument were prepared by counsel for the Owner (R. 28). Such were submitted to Douglas Mavor, as the representative of the partners, who were not represented by counsel. The partners objected to certain provisions of the early draft (R. 27). As a result, changes were made by Owner's counsel before the production of the final form of the contract which was ultimately executed on July 23, 1946. A copy was admitted in evidence as Plaintiffs' Exhibit 4, and it is reproduced *verbatim* in Appellant's Brief at page 23.

Mr. Mavor testified without contradiction that these changes were effected by substituting certain pages in the final form of contract in lieu of earlier pages. He produced a number of typewritten sheets which he identified as being pages from earlier drafts of the contract which were supplanted in the final draft. These earlier pages were offered in evidence as Plaintiffs' Exhibit 5 (R. 29).

Mr. Mavor testified again without contradiction that among the changes so effected was the elimination of a provision in the first proposal that gave the Owner an option to buy the logs produced from the timber, but imposed no obligation upon it to do so. The provision inserted in lieu thereof, he testified, was understood to reverse the option. Instead of giving the Owner the option to buy, the final draft was designed to give the Logger the option to sell to the Owner, but committed the Owner to buy (R. 27).

The initial sentence of paragraph 4 in Plaintiffs' Exhibit 5 is:

"In consideration of the execution of this contract by the Owner and the granting of the rights herein set forth, the Logger agrees that the Owner shall have a continuing and irrevocable option to purchase from the Logger at current market prices (less the deductions hereinafter set forth) all logs logged by the Logger from the said lands hereinabove described."

The initial sentence of the substituted paragraph 4 of the final form is:

"The Owner agrees to purchase from the Logger at current market prices as same are defined in paragraph 5 of this contract, all logs (including all species and grades) logged by the Logger from the lands hereinabove described." (B. 26)

The final form contains no covenant by the Logger to sell such logs to the Owner, although in paragraph 6 there is an express promise by the Logger to sell, and by the Owner to buy, pulpwood—which is not here involved (B. 28).

At the conclusion of the trial, Judge Boldt expressed the opinion that, under the above contract, the loggers had the sort of proprietary interest in the logs which entitled them to capital gains treatment on the cutting of the timber under Section 117(k) of the Internal Revenue Code of 1939 (R. 57, 58). He recognized that the instant case was to be distinguished on this ground from *Ellison v. Frank*, 245 F.2d 837, which he had decided against the taxpayer and which was then on appeal to this Court. He finally announced that he would take the instant case under advisement pending the decision of

this Court in the *Ellison* case because, if *Ellison* were reversed, judgment for the taxpayers here must follow, *a fortiori*; whereas even if *Ellison* were affirmed, he would still be inclined to find for the plaintiffs (R. 56-59).

After this Court had handed down its decision in *Ellison*, Judge Boldt wrote to counsel in the instant case, directing the presentation of findings and judgment for the plaintiffs, and saying:

“Nothing in the Ellison opinion militates against my tentative intention to grant the relief prayed for by the plaintiff in this instance.” (R. 9)

Findings of Fact, Conclusions of Law, and a Judgment were thereafter signed and entered. These were expressly approved as to form (R. 14, 16).

Conclusion of Law I, so entered, is as follows:

“That the contract between plaintiffs and Puget Sound Pulp & Timber Co. gave plaintiffs the contract right to cut timber for sale, which right was held for more than six months and entitled plaintiffs to elect to treat the cutting thereunder as a sale or exchange under the provisions of Section 117(k) of the Internal Revenue Code of 1939.”

Appellant’s Designation of Point on Appeal is in the following language:

“That the Court erred in holding that the agreement of July 23, 1946, providing for the purchase of stumpage, cutting thereof, and sale of logs back to the vendor gives the logger a proprietary interest in the timber to entitle them to the election permitted under Section 117(k) of the Internal Revenue Code of 1939.” (R. 17, 18)

ARGUMENT

The Judgment of the District Court Is Correct and Should Be Affirmed

The distinguished judge before whom this case was tried, heard the testimony of the witnesses and concluded that under the agreement between Puget Sound Pulp & Timber Company and themselves, the plaintiff taxpayers acquired a contract right to cut timber for sale, which—having been held for more than six months, entitled them to elect to treat the cutting thereunder as a sale or exchange under Section 117(k) of the Internal Revenue Code of 1939 (R. 13). The trial judge heard the testimony concerning the formation of the contract and the testimony concerning the actions of the parties pursuant to it. He concluded that under this agreement, the plaintiffs acquired “the right and license to enter upon the lands described in the contract and remove therefrom all merchantable timber thereon” (B. 23). They had “agreed to pay to the owner for all merchantable timber so cut, logged and removed, stumpage payments” in accordance with a definite schedule set forth in paragraph 3 of the written agreement (B. 25). The trial judge, versed in the law of the State of Washington, knew that when timber is cut under such a contract, title to it passes to the licensee. *Welever v. Advance Shingle Co.*, 34 Wash. 331, 334, 75 Pac. 863. That, the trial judge recognized, was a proprietary interest equivalent to ownership—and these plaintiffs were not mere hired hands, but became the holders of the legal title to the felled timber. This was thereafter bucked, branded and transported by them. Ultimately it was sold and delivered to Puget Sound Pulp & Timber Company (R.

41). The latter paid for the resulting logs, finally acquiescing in the contention of Johnson & Mavor in a dispute concerning the computation of price (R. 46, 47).

We submit that under this state of facts the conclusion of the District Court was eminently correct in holding that within Section 117(k) this constituted "the cutting of timber (for sale . . .) . . . by the taxpayer who . . . has a contract right to cut, such timber. . . ."

While counsel for the Government have now apparently attempted to shift their position, their Designation of Point on Appeal confirms their concession that the transactions between Puget Sound Pulp & Timber Company and Johnson & Mavor amounted to "the purchase of stumpage, cutting thereof, and the sale of logs back to the vendor" (R. 17). It seems to us that this concession must necessarily result in the affirmance of the present judgment.

It is a concession that here the taxpayers were the owners of the timber upon severance, and that they had the right to sell it, and did sell it. This is the direct opposite of the situation in the *Carlen* case. Adopting the language of the Commissioner's brief, the decision in that case says of the taxpayers there involved:

"They were not owners of the timber either before or after cutting, and had no right to sell it or use it in their own trade or business." (220 F.2d 338, 340)

These taxpayers certainly acquired a proprietary interest in the timber. Upon severance, they had title. During the period of bucking, branding, colddecking and transporting, they retained that title. Under Wash-

ington law, accordingly, risk of loss by fire or theft was upon them during this period. The leading case of *Holt Manufacturing Co. v. Jaussaud*, 132 Wash. 667, 233 Pac. 35, states the rule as follows (p. 669):

“Where there is an ordinary executory contract of sale of a specific chattel, the general rule is that, if the property agreed to be sold is destroyed before the consummation of the sale, the loss will fall upon the vendor because the title is in him; in other words, under such circumstances the loss follows the title. 24 R.C.L. 494. Thus, if two parties enter into a contract, one agreeing to sell and the other to purchase a designated chattel, payment to be made at the time of delivery, and before the agreement is consummated by delivery the article is destroyed, the loss must be borne by the seller, and he has no rights against the purchaser, nor has the latter any rights against him.”

Passing of title to the severed trees and the consequent imposition of the risk of loss upon Johnson & Mavor is, we suggest, but another way of saying that Johnson & Mavor had a proprietary interest in the logs. Such a situation is entirely inconsistent with a mere service contract providing for cutting the owner's timber for him and is conclusive against appellant's contention to this effect (B. 16).

It is not particularly significant that the instant contract contained some stereotyped provisions which are commonly inserted in service contracts. As a government witness readily admitted, such “boiler-plate” provisions designed to protect the owner of the timber against damage to that remaining in his ownership and to insure proper logging are customarily required by

the owner to be inserted in any form of contract whether of the stumpage or the service type (R. 35, 36). The significant factor here, we suggest, is that the instant contract provides for a sale of the stumpage by the Owner, and a purchase of the logs by him. This is not consistent with a mere service contract.

It is significant, also, that the instant contract, unlike the ones in the *Ellison* and *Carlen* cases, made no mention of payment for "services" and had no provision for retention of title by the Owner. On the contrary, the testimony of the witnesses, including those for the government, referred to the payments by Puget Sound under this contract as payments for logs (R. 27, 44-47).

In the *Ellison* case, the taxpayer's lack of a proprietary interest was established by Par. 5 of the contract, providing that the taxpayer had no interest in the logs except his right to compensation, and by Par. 6 of the contract, in which the Owner agreed to pay the taxpayer for his "services." In the *Carlen* case, the taxpayer's lack of a proprietary interest was established by the contractual provisions that the Owner should have title to the logs until they were sold, and that the Owner was to pay the taxpayer, out of the proceeds, for his "service" (20 T.C. 573, 574-5).

In short, the contract in the instant case was one providing for sales, whereas in the *Ellison* and *Carlen* cases the contracts were service contracts.

ANSWER TO APPELLANT

Counsel for Appellant seek to gloss over the controlling provisions of the instant contractual arrangement by intimating that the provision for sale of stumpage and the provision for the purchase of logs by Puget Sound were mere "window-dressing" and not intended by the parties to have any effect (B. 18). We believe that such a contention is not open to Appellant in view of the fact that no such position was asserted in the trial court (R. 6) and in view of Appellant's Designation of Point on Appeal which recognizes that the agreement provides "for the purchase of stumpage, cutting thereof, and sale of logs back to the vendor" (R. 17). In any event, there is nothing in the record upon which properly to base any such contention and the finding of the District Court was manifestly to the contrary.

In addition counsel for Appellant point out alleged circumstances which they contend tend to indicate that it was not intended that Johnson & Mavor should ever acquire any proprietary interest in the timber.

In this connection they assert first, that the Agreement does not use terms such as "vendor" and "purchaser" (B. 16). This is captious. Under Washington law, as above noted, a license to enter lands with permission to cut and remove timber, to be paid for at an agreed price by the licensee, vests title to the timber in the licensee when so cut. *Welever v. Advance Shingle Co.*, 34 Wash. 331, 334, 75 Pac. 863. Such was the language of the instant contract.

Next they assert that Johnson & Mavor were "given the right to log and remove the timber subject to the

conditions of the contract which provided (Art. 1) that the partnership ‘*log and deliver*’ all of the timber to Puget Sound (Italics supplied)” (B. 16). This is not true. “(Art. 1)” merely fixes the time within which the “Logger shall log and deliver all timber from the lands described in this contract.” No mention is made therein of Puget Sound (B. 24). The provision with reference to delivery is paragraph 8 (B. 28). This provides:

“8. All logs cut and removed by the Logger pursuant to this contract (other than pulpwood) shall be transported in trucks by Logger to Owner’s Bay Creek boom or its Mt. Vernon boom on the Skagit River, and *all logs purchased by the Owner shall be there delivered.*” (Italics ours)

We submit that the foregoing italicized portion clearly supports the testimony below that originally this contract merely gave the Owner an option to buy the logs; and that later paragraph 4 was amended to give the option to the Logger to sell. It is a well-settled rule of law in Washington that where, as here, a contract is prepared by one party any ambiguity is to be resolved against that party and in favor of his opponent. *Willett v. Davis*, 30 Wn.2d 622, 636; 193 P.2d 321. Applying this rule, it is clear that only logs “*purchased*” by Puget Sound were to be “*delivered*” to them.

On page 17 of Appellant’s Brief, it is urged that the instant contract guarantees a profit to the Logger. As we read this Court’s decision in *Ellison v. Frank*, the incidence of economic risk is not material—the determining factor is the proprietary interest *vel non* in the logs which the taxpayer has the contract right to cut. If this be so, then this inquiry is immaterial. But, in any

case, the assertion is untrue. There was no guarantee in the contract. The price formula nowhere protected Johnson & Mavor in event of a drop in the price of logs, and in the event of log prices remaining stationary, no contribution was to be made to any increased labor costs sustained by Johnson & Mavor, and there was no assurance that the price formula would exceed the sum of Johnson & Mavor's labor costs and their indirect or overhead costs.

Again, Appellant's counsel point to a provision that the logs were to be branded with brands designated by Puget Sound, and with irons furnished by them (B. 17). A reasonable interpretation of this provision, we submit, is that as to logs purchased by Puget Sound, the latter had the right to provide the brands. The undisputed testimony of Mr. Mavor was to the effect that some logs were branded with Johnson & Mavor's own brands (R. 48).

They assert that property taxes on the timber itself were apparently borne by Puget Sound. The record does not support this assertion (R. 35).

They assert that Puget Sound bore the risk of loss of the timber (B. 18). Neither does the record reflect anything to justify this assertion. As we have heretofore pointed out, the risk of loss, from the date of cutting to the date of delivery was, under Washington law, upon Johnson & Mavor.

They point to certain other protective provisions which were inserted in the contract in the interest of Puget Sound (B. 18). As Mr. Clayton E. Rogers, treasurer of Puget Sound Pulp & Timber, testified, these

provisions are usual and common to both stumpage and service contracts (R. 36, 37).

Counsel for Appellant assert that the provision against assignment of the contract by the Logger without permission negatives any proprietary interest in the timber (B. 18). We do not agree. This is a usual protective provision to assure the timber owner that he need only have dealings with a responsible and competent logger. Surely a tenant may be said to have a proprietary interest in a term for years even if the lease contains a provision prohibiting assignment without the landlord's consent.

Finally counsel note that "all the timber cut under the contract was delivered to Puget Sound" (B. 18). Were we inclined to insist upon employment of terms in accord with industry usage, we might answer that no "timber" was delivered to Puget Sound. Much of the confusion in Appellant's Brief stems from a lack of appreciation of the essential difference between "timber" and "logs" as those terms are used in the industry. We concede that Johnson & Mavor sold and delivered to Puget Sound all "*logs*" produced as a result of the operations under the instant contract. Why not? Johnson & Mavor had that right. As long as there was an actual sale and not a sham, the District Court's judgment was right.

CONCLUSION

The judgment of the District Court was right and should be affirmed.

Respectfully submitted,

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In the
United States
Court of Appeals
For the Ninth Circuit

In the Matter of the Application for a
Writ of Habeas Corpus of JACK E.
DUNCAN, *Appellant*,
v.
B. J. RHAY, Superintendent of the
Washington State Penitentiary at
Walla Walla, Washington,
Appellee. } No. 15743

APPEAL FROM THE JUDGMENT OF THE DIS-
TRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN
DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

BRIEF OF APPELLEE

JOHN J. O'CONNELL,
Attorney General,

MICHAEL R. ALFIERI,
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Attorneys for Appellee.

In the
United States
Court of Appeals
For the Ninth Circuit

In the Matter of the Application for a Writ of Habeas Corpus of JACK E. DUNCAN,	<i>Appellant,</i>	} No. 15743
v.		
B. J. RHAY, Superintendent of the Washington State Penitentiary at Walla Walla, Washington,	<i>Appellee.</i>	

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In the
United States
Court of Appeals
For the Ninth Circuit

In the Matter of the Application for a Writ of Habeas Corpus of JACK E. DUNCAN, v. B. J. RHAY, Superintendent of the Washington State Penitentiary at Walla Walla, Washington,	}	No. 15743
<i>Appellant,</i>		
<i>Appellee.</i>		

APPEAL FROM THE JUDGMENT OF THE DIS-
TRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN
DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

BRIEF OF APPELLEE

APPELLEE'S STATEMENT OF THE CASE

This individual, together with Loren L. Hinton and Roy E. Mevis, was charged with the crime of grand larceny on April 20, 1949. The appellant and his co-defendant pleaded guilty to such charge and were each sentenced to confinement in the Washington State Penitentiary at Walla Walla for a period

not to exceed fifteen years. On April 20, 1949, and as early as March 7, 1949, appellant was represented by his counsel, Mr. Robert E. Cooper.

Thereafter, appellant twice petitioned the Washington Supreme Court for a writ of habeas corpus. In the first instance, his petition was remanded to the Superior Court for Pierce County where a hearing was held and the writ denied. The second petition was likewise denied, from which appellant appealed for Certiorari to the Supreme Court of the United States and was refused.

Substantially the same contention as was made in these petitions to the state court was presented to the United States District Court, *i.e.*, that appellant never pleaded guilty to the crime for which he was sentenced. On denying the petition, the District Court adopted as its own the findings of fact and conclusions of law made by the Superior Court for Pierce County. The appellant now specifies as error the following:

I.

The Superior Court for Pierce County had lost jurisdiction at the time it made its decision on appellant's petition.

II.

The petition to the District Court presented new matter proving erroneous the forementioned findings of fact and conclusions of law.

III.

The District Court did not dispose of the matter as law and justice require.

APPELLEE'S STATEMENT OF
QUESTIONS INVOLVED

I.

Do the provisions of § 20 of Art. IV of the State Constitution and RCW 2.08.240 divest a superior court of jurisdiction to render a decision after expiration of ninety days?

II.

Assuming the petition to the District Court presented new issues, nevertheless, is such court precluded in any way in its determination of the matter from adopting the findings of fact and conclusions of law of the state court?

III.

Is a district court required by law and justice to do more than was done here?

ARGUMENT

I.

There is abundant authority that a decision rendered after ninety days is not void. *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105; *Ex rel. Washington Dredge & Imp. Co.*, 21 Wash. 629, 59 Pac. 505; *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362;

Harris v. Fidalgo Mill Co., 38 Wash. 169, 80 Pac. 289; *Moylan v. Moylan*, 49 Wash. 341, 95 Pac. 271.

In *Brown v. Porter*, *supra*, the question is discussed as follows, at page 330:

“Lastly, it is contended that the judgment is void because it was not entered within the time limited by law. While some cases may be found to the contrary, the decided weight of the authorities is to the effect that judgments so entered are not void. See 12 Am. and Eng. Ency. Law, p. 71. * * *”

In *Demaris v. Barker*, *supra*, a similar argument based upon § 20 of Art. IV was proposed and answered as follows, at pages 202-203:

“As another section of the constitution declares all of its provisions to be mandatory unless by express words they are declared to be otherwise, it is argued that this provision, being mandatory, can have no force or effect if it is not held that delay beyond the period fixed deprives the court of jurisdiction to render a decision.

“It seems to us, however, that such a construction of the section would be directly subversive of its purpose. Manifestly, the purpose of the provision was to secure a speedy determination of causes submitted to the court for decision. * * *

“* * * but certainly it was never thought that the remedy was to be found in the holding that the judgment afterwards rendered is nugatory. To give it this construction is to prolong the very evil it was sought to avoid, and to punish the very persons whom it was intended should be its beneficiaries. * * *”

II.

Where a petition for the writ of habeas corpus is disposed of merely upon consideration of the petition itself, as here, Rule 52 of the Federal Rules of Civil Procedure does not require findings of fact and conclusions of law to be entered. *Albert ex rel. Buice v. Patterson*, 155 F. (2d) 429. On the other hand, the court is in no way prevented from formulating or adopting findings and conclusions. Rather, it is a matter entirely within the court's discretion as was indicated in *Miller v. Tilley*, 178 F. (2d) 526, 528 as follows:

“ * * * After a case has been submitted and the trial judge has determined which party is entitled to prevail, it is for the judge to determine whether he will formulate the necessary findings himself, have counsel for the prevailing party prepare findings for the court, or settle the findings on notice. Whatever method a trial judge may follow, he assumes full responsibility for the findings made or adopted, which, when signed and filed by him, are the findings of the court.”

Where the grounds relied on for habeas corpus have been fully considered by state courts, a federal district court may base its decision on the record there. *Bailey v. Smyth*, 220 F. (2d) 954. Thus, there is no obstacle to a federal district court's so adopting as its own the findings and conclusions of a state court.

The appellant has alleged that new issues were presented to the district court, reference being made

to the state court hearing. It is his claim that such hearing was unconstitutional, this assertion being based principally upon the court's supposed failure to allow his counsel adequate time to prepare. The claim is plainly without merit, due process not requiring the presence of counsel in habeas corpus proceedings. *Collins v. Heinze*, 217 F. (2d) 62.

III.

Finally, the appellant contends that the District Court did not dispose of the matter as law and justice require. It is argued that 28 U. S. C. § 2243 compels the writ to be issued in his case. However, when the relied upon portion of that section is read in its entire, the fallacy of his argument is apparent:

“A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. * * *

In *Brown v. Allen*, 344 U. S. 443, 460-461, 73 S. Ct. 397, 97 L. Ed. 469, the Supreme Court of the United States considered this section as follows:

“Jurisdiction over applications for federal habeas corpus is controlled by statute. The Code directs a court entertaining an application to award the writ. But an application is not ‘entertained’ by a mere filing. Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitled him to relief.

“The word ‘entertain’ presents difficulties. Its meaning may vary according to its surroundings. In § 2243 and § 2244 we think it means a federal district court’s conclusion, after examination of the application with such accompanying papers as the court deems necessary, that a hearing on the merits legal or factual is proper. * * *

Thus, where an application for the writ of habeas corpus is refused on the petition itself without more, *i.e.*, where it is not “entertained,” there is clearly no mandate that the writ should issue.

Apart from the statute, appellant has also appeared to argue that the requirements of law and justice were not met simply by virtue of this summary denial without hearing of his petition in the district court. Again, *Brown v. Allen, supra*, disposes of this contention as follows, at page 465:

“ * * * As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies. * * *

CONCLUSION

It is respectfully submitted that this appellant has not been denied any rights guaranteed by either the constitution or laws of the State of Washington or of the United States, either in the criminal proceedings or in the subsequent habeas corpus proceedings. We have no doubt that he pleaded guilty, on April 20, 1949, of the crime for which he is now incarcerated. No merit appearing to any of the appellant's allegations, it is respectfully submitted that the order of the District Court be affirmed.

Respectfully submitted,

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MICHAEL R. ALFIERI,
Assistant Attorney General,

FRANKLIN K. THORP,
Assistant Attorney General,
Attorneys for Appellee.

IN THE

FOR THE NINTH CIRCUIT

Appellant,

vs.

Appellees.

APPELLEES' BRIEF.

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No. 15745
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOSE PIMENTAL NAVARRO,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director, Immigration and Naturalization Service at Los Angeles, California, and JOSEPH A. DUMMEL, Special Inquiry Officer, Immigration and Naturalization Service at Los Angeles, California,

Appellees.

APPELLEES' BRIEF.

Statement of Jurisdiction.

On April 20, 1956, appellant filed his Complaint for Judicial Review and Declaratory Judgment.* The Answer of appellees was filed on June 28, 1956. On April 1 and April 8, 1957, the action was tried before the Honorable William M. Byrne, United States District Judge. Judge

*No reference can be made to the transcript of record since none has been prepared at the present time.

ment was entered in favor of appellees on May 10, 1957. A timely notice of appeal was filed on May 21, 1957.

The District Court had jurisdiction of the action under 5 United States Code Sec. 1009.

This Court has jurisdiction of the appeal under 28 United States Code Sec. 1291.

Statement of the Case.

In our opinion, there are only three questions involved: (1) Is there sufficient evidence to support the Immigration and Naturalization Service finding that appellant *for gain* assisted another alien to illegally enter the United States; (2) Was appellant eligible for the relief of suspension of deportation or voluntary departure; (3) Did the denial of relief under 8 U. S. C. Sec. 1182(c) constitute an abuse of discretion. These questions arose in the following manner.

The appellant is a native and citizen of Mexico who was admitted for permanent residence to this country on March 15, 1920. On March 4, 1954, appellant departed to Mexico and on the same day, returned to the United States. On the occasion of this trip, appellant assisted another Mexican alien to enter illegally. Appellant was indicted for this offense, and on April 30, 1954, pleaded guilty to violations of 8 U. S. C. Sec. 1324(a)(1) and of 8 U. S. C. Sec. 1324(a)(2).

On the same date, April 30, 1954, appellant was served with a warrant of arrest in deportation proceedings which

charged that he was subject to deportation pursuant to 8 U. S. C. Sec. 1251(a)(13) for having knowingly and for gain, assisted, aided and abetted an alien to enter the United States illegally. A deportation hearing was held upon this charge on June 3, 1954, and July 8, 1954.

On October 13, 1955, a Special Inquiry Officer ordered appellant deported under the charge. The Officer further found appellant ineligible for suspension of deportation and voluntary departure under 8 U. S. C. Secs. 1254(a),(e), and also denied relief under 8 U. S. C. Sec. 1182(c).

An administrative appeal of this decision was taken to the Board of Immigration Appeals. The Board upheld the decision of the Special Inquiry Officer by dismissing the appeal on March 12, 1956. In so doing, the Board exercised the discretion afforded under 8 U. S. C. Sec. 1182(c) and denied appellant relief under that section.

ARGUMENT.

I.

Appellant for Gain Assisted Another Alien to Enter the United States.

The first question is whether there is reasonable, substantial and probative evidence to support the finding of the Special Inquiry Officer on October 13, 1955, that it was for gain that appellant assisted the illegal entry of another alien on March 4, 1954. Appellant is deportable, if at all, under the provisions of 8 U. S. C. Sec. 1251(a)(13), which provides:

“(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.”

It is undisputed that the record of conviction of appellant for having knowingly brought into the United States an alien not lawfully entitled to enter, satisfies all elements for deportation under Sec. 1251(a)(13) save the element of “gain.”

Navarrette-Navarrette v. Landon, 223 F. 2d 234, 236 (C. A. 9, 1955).

The evidence with respect to gain upon which the Special Inquiry Officer relied consists of appellant's admissions. Exhibit No. 2 to the instant deportation hearing was a signed statement of appellant taken on March 5, 1954. At page 2 thereof, appellant explained why he committed the offense:

“Q. When, where and how did you last enter the United States? A. I entered 3/4/54 through the

port of San Ysidro in my car by presenting my passport.

Q. Why were you arrested by the Immigration Officers? A. The (*sic*) arrested me because I was taking that man up north.

Q. Who do you mean when you say 'that Man'? A. I don't know what his name is now, but I had his name written down on a little piece of paper when I went to Tijuana.

Q. Where did you first see the man that you refer to, who was riding in your car? A. I first saw him in his house, in Tijuana, on 3/4/54, about 4:00 P.M.

Q. Will you explain to me why you went to his house and why he was in your car? A. I am going to tell you the pure truth. I was working in Azuza (*sic*) selling vegetables in my truck, it is an army made into a store inside, and I was going up a hill and my truck was not running very well and when I stopped a man started talking to me. I know this man by sight only. He asked me if I would go to Tijuana and get the man who was with me in my car. He wrote his name and address on a piece of paper and gave it to me. He offered me \$50 to go to Tijuana and bring him back to Azuza (*sic*). When I started out again my truck broke down, broke a piston or something, I do not know. That left me with no way to work and I decided (*sic*) to go to Tijuana and see my Compadre and see if he could lend me the money to have my truck fixed. If not I was going to see if, with good luck, I could bring back the boy. My compadre was sick when I reached Tijuana and could not lend me the money. So I decided (*sic*) to take a chance and take the boy. I arrived in Tijuana 3/4/54 and (*sic*) went to see my compadre first then went to the boys house. I told him that I had been sent by a man to take him to Azuza (*sic*) and I showed him the paper that I had.

The mans name was on the paper but I do not remember what it is and I threw the paper away after I had found the boy. This man is not a boy, he is a man older than I am, boy is just an expression. After I met him and told him who I was we got in my car and I drove him to the park near the line and there he got out of the car and went and jumped the line and I went through the gate and when I reached the other side he was there on the sidewalk a little ways past the Grey Hound Bus depot in San Ysidro and there he got into my car and we drove directly to where we were arrested.

Q. When did you cross the border, that is what time, on 3/4/54? A. About 5:00 or 5:30 PM.

Q. Did you know that the man whom you brought to the park in your car did not have a legal right to enter and reside in the United States? A. Yes, I think that that was the reason I was being paid to take him to Azuza (*sic*).

Q. Is the man that was arrested with you named Sixto Medina? A. Yes that is what he told me his name is, when he was presented to me a little while ago.

Q. Did the man who sent you after Sixto give you any money? A. He gave me \$15 for gasoline."

In the hearing on July 8, 1954, appellant made the following statements:

"Q. Now this matter which resulted in your arrest and conviction for aiding an alien to enter the United States began in the early part of this year. Will you please tell us how this matter happened? A. A man in Azusa told me that he would give me \$50 if I bring his father from Tijuana.

Q. Now at that time were you going on a trip to Tijuana? A. I was going to Tijuana to see my

compadre to borrow \$50 because my truck had broken down and I could not move it.”

Appellant's position is very clear. He needed \$50 to fix his truck; he may have preferred obtaining the money from a friend in Tijuana, but when his friend was unable to make the loan, he decided to accept the offer of \$50 for smuggling an alien into this country. The only conclusion deducible from these facts is that it was the offer of \$50 that induced appellant to smuggle—had it not been for the money, appellant would not have “decided to take a chance and take the boy.” Thus there clearly is sufficient evidence from which the Special Inquiry Officer reasonably could have found that appellant's smuggling attempt was “for gain.” The facts herein do not appear to be any different than those contained in *Navarrette-Navarrette v. Landon*, 223 F. 2d 234, 236, *supra*, wherein this Court held:

“ . . . Appellant claims that he was helping the aliens because of a shortage of orange pickers in the Corona area. He denies receiving any money or anything of value from the aliens; he also denies any conversation regarding the payment of money. In short, he denies that his actions were in any way motivated by gain.

“The record, however, does not bear out these claims. Appellant, in a sworn statement dated November 28, 1949, admitted that he had an arrangement with Juan Ramirez to receive fifty dollars for bringing the latter's alien brother into the United States, that he went to Tijuana pursuant to that agreement, contacted the brother, and after the brother crossed the international line, appellant was transporting him into the interior of California when he was apprehended by immigration authorities. At the hearings, appellant was shown the statement and admitted he understood what it contained and that he

had made the statement. In addition, appellant testified at the hearings that the aliens told him they would give him fifty dollars when they got work in California.

“[1] These admissions by appellant, together with his conviction under 8 U. S. C. §144, provide reasonable, substantial and probative evidence to support the finding that appellant violated the deportation statute.”

II.

Appellant Was Ineligible for the Relief of Voluntary Departure or Suspension of Deportation.

The next point concerns whether appellant was eligible for the relief available under 8 U. S. C. Sec. 1254(a) and 8 U. S. C. Sec. 1254(e). The Special Inquiry Officer determined that appellant was ineligible for suspension of deportation inasmuch as appellant could not establish the required continuous residence within the United States, having left for several hours on March 4, 1954. Appellant attacks this finding as erroneous. We assume for the purposes of this argument that the reason for the finding of ineligibility was erroneous. This is not conclusive of the issue, however, since

“In the review of judicial proceedings the rule is well settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.”

Yanish v. Barber, 232 F. 2d 939, 947 (C. A. 9, 1956).

The ultimate decision of the Special Inquiry Officer was that appellant was ineligible for the relief of suspension of deportation. In this he was correct. The finding of good moral character is a statutory prerequisite to the relief of

suspension of deportation under all the paragraphs of 8 U. S. C. Sec. 1254(a), as well as to the relief of voluntary departure under 8 U. S. C. Sec. 1254(e). 8 U. S. C. Sec. 1101(f)(3) precludes a finding of good moral character for a person who is or was

“a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of section 1182(a) of this title.”

Appellant is a person described in Sec. 1182(a)(31), for that section pertains to

“Any alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.”

Consequently, appellant is precluded by law from being able to establish his eligibility for the relief of suspension of deportation or of voluntary departure. Thus the action of the Special Inquiry Officer in so holding was proper, whatever his reasoning may have been.

III.

It Was Not an Abuse of Discretion to Deny Appellant Relief Under Section 1182(c).

8 U. S. C. Sec. 1182(c) provides:

“Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section. . . .”

Appellant, at the time of his deportation hearing, applied for *nunc pro tunc* discretionary relief under this subsection. The Board of Immigration Appeals exercised its discretion and denied appellant such relief.

Since Sec. 1182(c) commits the granting of such relief to the "discretion of the Attorney General," judicial review thereof is precluded, as the Administrative Procedures Act (5 U. S. C. Sec. 1009) allows judicial review of agency action

"Except so far as . . . (2) agency action is by law committed to agency discretion."

In view of the exercise of discretion in this case, this Court should not review the matter.

Anderson v. Holton, 242 F. 2d 596 (C. A. 7, 1957);

United States ex rel. Kaloudis v. Shaughnessy, 180 F. 2d 489 (C. A. 2, 1950).

Even if reviewed to determine whether there was an abuse of discretion, the action of the Immigration and Naturalization Service must be upheld. The Board recognized that hardship would result by a denial of Sec. 1182(c) relief, but nevertheless decided:

"However, it is our opinion that the *nature of the acts* which gave rise to deportability which acts recently occurred, are such that the granting of the relief contained in Section 212(c) of the Immigration and Nationality Act is not warranted."

The act or acts giving rise to appellant's deportability, of course, concerned the smuggling of the alien. This is the most serious immigration offense with which one can

be charged. As was noted in *Dessalernos v. Savoretti*, 244 F. 2d 178, 183, 184 (C. A. 5, 1957), this is the *only* ground of deportation for which suspension is not possible.

“ . . . [A]liens who aid others to enter illegally, §1251(a)(13), are entirely precluded from seeking suspension of deportation, thus suggesting that Congress intended to penalize through the immigration laws those who violated them.”

Such being the nature of the particular ground of appellant's deportation, there is no abuse of discretion in denying appellant his requested relief.

Conclusion.

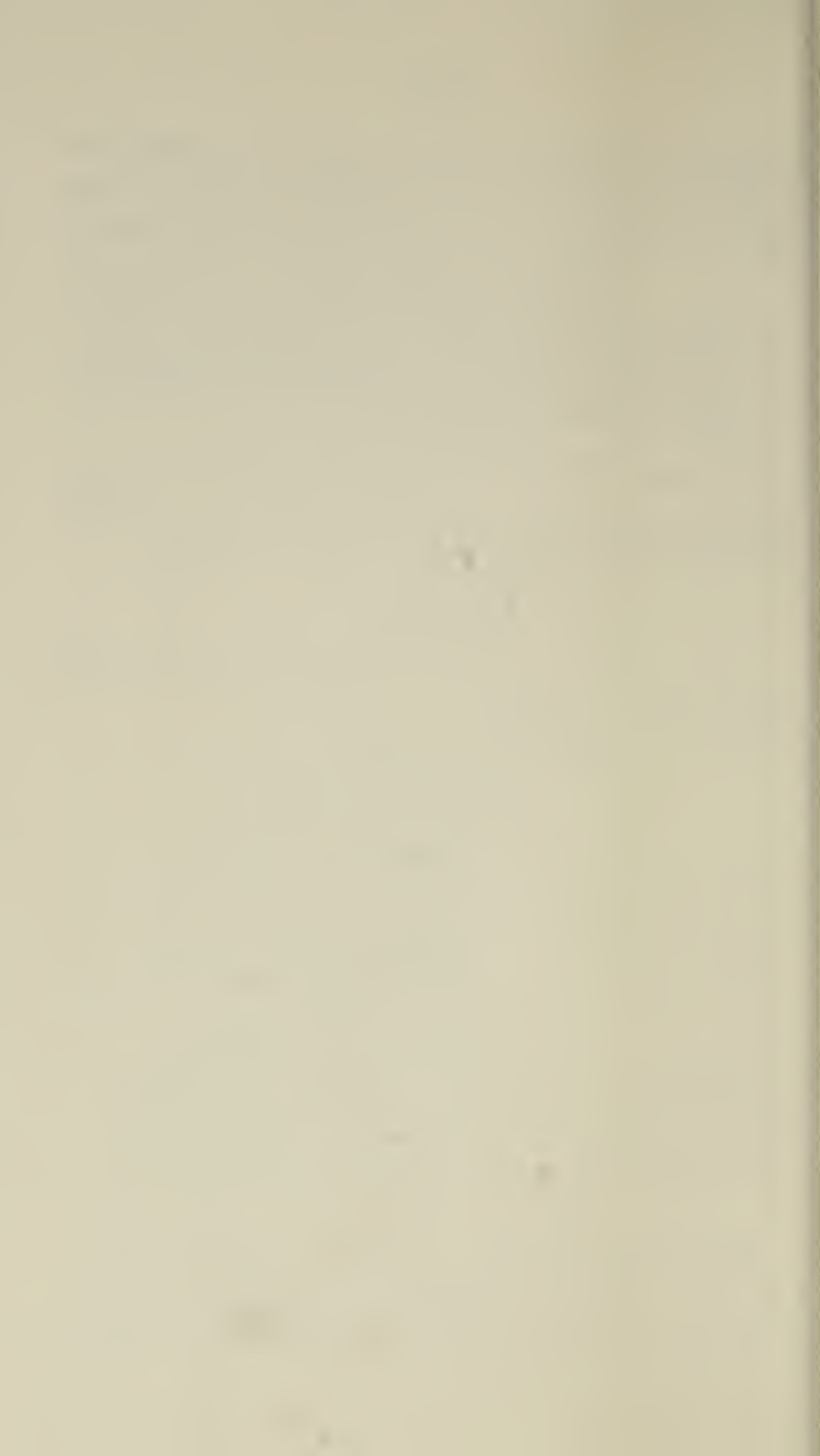
In view of the foregoing, the judgment of the District Court should be affirmed.

Respectfully submitted,

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United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
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No. 15746

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONCEPCION ESTRADA-OJEDA,

Appellant,

vs.

ALBERT DEL GUERCIO, Officer in Charge, Immigration
and Naturalization Service at Los Angeles, California,
et al.,

Appellees.

APPELLEES' BRIEF.

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No. 15746

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONCEPCION ESTRADA-OJEDA,

Appellant,

vs.

ALBERT DEL GUERCIO, Officer in Charge, Immigration
and Naturalization Service at Los Angeles, California,
et al.,

Appellees.

APPELLEES' BRIEF.

Statement of Jurisdiction.

On April 26, 1956, appellant filed her Complaint for Judicial Review and Declaratory Judgment.* The answer of appellees was filed on June 28, 1956. On April 1 and April 8, 1957, the action was tried before the Honorable William M. Byrne, United States District Judge. Judgment was entered in favor of appellees on May 3, 1957. A timely notice of appeal was filed on June 4, 1957.

*No reference can be made to the transcript of record since none has been prepared at the present time.

The District Court had jurisdiction of the action pursuant to United States Code, Title 5, Section 1009. This Court has jurisdiction of the appeal pursuant to United States Code, Title 28, Section 1291.

Statement of the Case.

Only two questions are involved in this appeal. The first is whether appellant was properly found deportable on the charge that, at the time of her last entry into the United States, she was a person likely to become a public charge. The second is whether the Immigration and Naturalization Service properly determined that appellant had not proved her good moral character in connection with her application for suspension of deportation or for voluntary departure. These questions arose in the following manner:

Appellant is a native and citizen of Mexico who was lawfully admitted into the United States for permanent residence on June 15, 1943. Her last entry occurred on September 15, 1951. On May 27, 1952, appellant was served with a warrant of arrest in deportation proceedings which charged that she was subject to deportation pursuant to former Title 8, U. S. C. §136(i), in that at the time of her last entry, she was a person likely to become a public charge.

A deportation hearing was held pursuant to these charges on September 26, 1952, as a result of which the Hearing Officer ordered appellant deported on December 2, 1952. An administrative appeal of this order

was taken to the Board of Immigration Appeals. On July 17, 1953, the Board entered an order sustaining the finding of deportability, but granted appellant the privilege of voluntary departure in lieu of deportation.

On November 16, 1953, appellant moved the Board to reopen the case, and on January 4, 1954, the Board ordered the deportation hearing reopened. On April 21, 1954, another hearing was held before a Special Inquiry Officer. On May 10, 1954, the Officer found that appellant was deportable, but ordered appellant be granted the privilege of suspension of deportation, subject to the approval of Congress. On January 3, 1955, the hearing was reopened on the Special Inquiry Officer's own motion in order to take additional evidence relating to appellant's moral character.

Additional such evidence was taken on January 28, 1955, and on August 5, 1955. On November 10, 1955, a Special Inquiry Officer again found appellant deportable and, from the new evidence taken, found that appellant had not established her good moral character. Consequently, he ordered appellant deported and ordered that her application for suspension of deportation or voluntary departure be denied. The Board of Immigration Appeals affirmed this decision on January 20, 1956.

ARGUMENT.

I.

Preliminary Statement.

This Court need merely determine whether there was reasonable, substantial and probative evidence to support the two questioned findings of the Immigration and Naturalization Service. It need not review the Immigration and Naturalization Service determinations *de novo* to determine the correctness thereof. As was succinctly stated in *Yasuji Fumita v. Nagle*, 58 F. 2d 184, 186 (9 Cir., 1932):

“That the findings of the Secretary of Labor are conclusive and binding upon this court, where there is any evidence in the record to substantiate them, is too well settled to require citation of authorities.”

Accord:

Ali v. Haff, 114 F. 2d 369, 373 (9 Cir., 1940);

Ow Tai Jung v. Haff, 89 F. 2d 329 (9 Cir., 1937).

Consequently, the issue is not whether this Court might have decided the two questions herein involved differently than did the Immigration and Naturalization Service, but whether there existed some evidence to support the administrative determinations.

II.

At the Time of Her Last Entry, Appellant Was a Person Likely to Become a Public Charge.

Appellant challenges the finding of the Special Inquiry Officer that she was a person likely to become a public charge at the time of her entry into the United States on September 15, 1951. The term “likely to become a public charge” has been defined judicially. In the case

of *In re Keshishian*, 299 Fed. 804 (D. C. N. Y., 1924), it was stated:

“In order to constitute them likely to become a public charge, there must be evidence that they are likely to be supported at the expense of the public.”

In *Ex parte Mitchell*, 256 Fed. 229, 230 (D. C. N. Y. 1919), the Court held:

“A ‘person likely to become a public charge’ is one who for some cause or reason appears about to become a charge on the public, one who is to be supported at public expense, by reason of poverty”

The Court further indicated that there should be evidence that the alien at some time had “relied on the charity of others” in order to sustain this ground of deportation. In the instant case, there is abundant evidence that appellant relied upon public charity, both before and after her entry on September 15, 1951. Exhibits 5 and 20, introduced at the deportation hearing, reflect the following:

Appellant received aid from the Bureau of Public Assistance in the form of general relief from October 31, 1947, to December 31, 1948, amounting to \$759.45. In view of the birth of an illegitimate child in 1948, the form of relief was changed on January 1, 1949, to Aid for Needy Children which continued through August 31, 1953, and which amounted to \$5,010.27. In addition, appellant received aid from the Los Angeles County Hospital from February 10, 1948, through June 11, 1953, in the total sum of \$700.03. Thus a total of \$6,469.75 in public relief was given appellant from 1947 to 1953.

Appellant's first contention regarding deportability appears to be that appellant would have been self-supporting had it not been for the birth of her daughter in 1948. It is true that appellant might have been able to work had she not been encumbered by a child of tender years, but this does not make her any less likely a public charge. Appellant's argument merely recites the cause, but does not affect the fact of her indigence.

Appellant's second contention concerns whether she need have reimbursed the County of Los Angeles for the \$5,010.27 given as Aid for Needy Children. Irrespective of whether such aid was reimbursable, it constituted public charity upon which appellant was required to rely. Consequently such aid is evidence of appellant's destitution just as much as is reimbursable aid.

There would seem to be no real question of appellant's deportability. At the time of her entry on September 15, 1951, she had a three-year-old child to support, was jobless, had no one who was legally obligated to support her, and she had received considerable assistance from public charities in this country prior to such entry. The facts occurring subsequent to her entry further bear out her status. Appellant was forced to resort to public charity for her existence of and that of her daughter until August 31, 1953. Consequently, the finding that appellant was likely to become a public charge at the time of her entry was amply supported by the evidence.

III.

Appellant Was Ineligible for Discretionary Relief Because She Did Not Prove Her Good Moral Character.

In the administrative proceeding, appellant requested the discretionary relief either of suspension of deportation or of voluntary departure. The statute authorizing such relief, former Title 8, U. S. C. §155(c), placed the burden of establishing good character upon the alien:

“In the case of an alien . . . who has *proved* good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation, or (2) suspend deportation of such alien . . .” (Emphasis added.)

The Board decision of July 17, 1953, overruled the Hearing Officer's determination that appellant had not been a person of good moral character for the preceding five years. The Board gave its rationale as follows:

“The respondent testified that she lived with the father of her child for about four years but when the baby was born, he left her . . . We have held that a finding of good moral character is not precluded under the provisions of Section 19(c) of the Immigration Act of 1917, as amended, where such a relationship as here presented injures no one, no family was broken up, the public was not offended, and the alien had no other blemish on his record (*Matter of O.....*, 3889600, A. G. December 18, 1947, 2 I. & N. Dec. 840).

“*Here the evidence shows that the relationship terminated in 1948.* The respondent testified that

it was necessary for her to seek relief when the father of her child left her and she had no one to care for the child while she worked. *Under the circumstances*, we find respondent to have been a person of good moral character for the preceding five years.” (Emphasis added.)

Thus, because appellant had terminated her illicit relationship at least four years before her application for relief, and because appellant had no other blemish on her record, the Board at that time did not bar her from discretionary relief. Further relief was granted appellant by the May 10, 1954, opinion of a Special Inquiry Officer.

After the case was reopened to hear new evidence on the issue of moral character, the hearings of January 28, 1955, and August 5, 1955, were held. In those hearings, an undercover agent of the federal Bureau of Narcotics testified as follows: he and appellant had held a conversation relating to the possible purchase of narcotics from appellant's brother-in-law, Jose Garcia, wherein appellant had stated that such was a very dangerous business and she was reluctant to give out Garcia's address as she might be arrested. Later appellant furnished Garcia's address. The agent went to appellant's house on at least eight occasions and discussed the sale of narcotics with Jesus Valenzuela-Orantes and Garcia. Eventually the agent purchased two ounces of heroin from Garcia and Orantes at said residence.

Although appellant in the January 28, 1955, hearing denied living with Orantes, she later admitted in the

August 5, 1955, hearing that he had lived with her in her apartment for the previous two years. Appellant also stated that Valenzuela was the father of her child stillborn at the Los Angeles County Hospital on May 29, 1953. Appellant further stated that Valenzuela still came to her apartment and she still continued to have weekly sexual relations with him.

It was in view of the foregoing evidence that the Special Inquiry Officer on November 10, 1955, and the Board on January 20, 1956, found that appellant had not proved her good moral character for the preceding five years. Appellant cites as authority for the proposition that illicit sexual relations do not preclude a finding of good moral character, the same case cited in the above-quoted opinion of the Board on July 17, 1953. The distinguishing feature of this case, however, is that appellant has more than one illicit blemish on her record, and her latest affair still continues. Also, the Board opinion in the *Matter of O.....* which appellant cites, is rather poor authority for this Court to consider, since the decision of the same Board in the instant case was adverse to appellant.

Appellant further argues, at page 9 of her Brief, that the decision of the Special Inquiry Officer on November 10, 1955, was "utterly contrary" to the decision of the Hearing officer of May 10, 1954, in that appellant was held eligible for suspension of deportation in the latter decision. Such inconsistency, however, is not the indicia of error. Instead the criteria is whether there was reason-

able, substantial and probative evidence to support the finding of November 10, 1955. Needless to say, appellant's illicit relationship with Jesus Orantes is sufficient evidence upon which to predicate a finding that appellant had not proved her good moral character.

Appellant, at page 4 of her Brief, asserts that "the basis of the special inquiry officer's decision was the fact that a criminal charge involving the appellant had been subsequently dropped or held in abeyance." There may be authority for the proposition that a criminal charge not resulting in conviction cannot be the basis of a finding of bad moral character. Apparently appellant seeks to twist the facts in order to use such authority. However, a reading of the November 10, 1955, opinion of the Special Inquiry Officer will reveal that the above-quoted assertion is not correct. It was not the fact, *per se*, of a criminal charge having been filed against appellant that affected the Special Inquiry Officer; instead it was the sworn testimony of a federal narcotic agent as to appellant's activities which resulted in the finding of which appellant complains. Such testimony was competent evidence from which the Special Inquiry Officer could have inferred that appellant associated closely with narcotic traffickers and facilitated their sales by allowing her residence to be used as their meeting place.

In any event, the undisputed fact of appellant's existing illicit relationship is a sufficient predicate, standing alone, for the finding that she did not prove her good moral character. Consequently, the Immigration and Naturali-

zation Service did not err in its finding as to appellant's moral character and the resultant conclusion that she was therefore ineligible for discretionary relief.

Conclusion.

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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*Assistant U. S. Attorney,
Attorneys for Appellees.*

No. 15748

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FAUSTO GONZALEZ-JIMENEZ,

Appellant,

vs.

ALBERT DEL GUERCIO, District Director of Immigration
and Naturalization at Los Angeles, California, *et al.*,

Appellees.

APPELLEE'S BRIEF.

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No. 15748
IN THE
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FOR THE NINTH CIRCUIT

FAUSTO GONZALEZ-JIMENEZ,

Appellant,

vs.

ALBERT DEL GUERCIO, District Director of Immigration
and Naturalization at Los Angeles, California, *et al.*,

Appellees.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

On July 5, 1956, appellant filed his Complaint for Declaratory Relief and Judicial Review in the United States District Court at Los Angeles, California.* An Answer was filed by appellee on August 1, 1956, and the action was tried on April 1 and April 8, 1957, before the Honorable William M. Byrne, United States District Judge. Judgment was rendered on May 10, 1957, in favor of appellee. A timely notice of appeal was filed on May 28, 1957.

The District Court had jurisdiction of the action pursuant to 5 United States Code Section 1009, 8 United

*No reference can be made to the transcript of record since none has been prepared at the present time.

States Code Section 1329, and 28 United States Code Section 2201, *et seq.*

This Court has jurisdiction of the appeal pursuant to 28 United States Code Section 1291.

Statement of the Case.

Although various errors are specified by the appellant, he raises only one point in his argument: whether the denial of appellant's application for *nunc pro tunc* permission to reapply for admission into the United States was arbitrary and an abuse of discretion. This question arose in the following manner.

Appellant is a native and citizen of Mexico who, prior to December 26, 1953, had been within the United States illegally on four separate occasions. On each of these occasions, appellant was allowed the privilege of departing voluntarily from this country in lieu of deportation. On December 26, 1953, after his fifth illegal entry, appellant was ordered deported, but was allowed to depart at his own expense. This procedure constitutes a deportation. (8 U. S. C., Sec. 1101(g); *Corsetti v. McGrath*, 112 F. 2d 719 (9 Cir., 1940).)

It is a felony, as well as a ground of exclusion and deportation, for an alien to enter the United States after once having been deported, without first having obtained the express consent of the Attorney General to his reapplying for admission. (8 U. S. C. Sec. 1326(2); 8 U. S. C. Sec. 1182(a)(17); 8 U. S. C. Sec. 1251(a)(1).) On February 4, 1954, appellant applied for an immigrant visa from the American Consul in Mexico City, without first having obtained said express consent of the Attorney General. In so applying, appellant stated that he had never been deported from the United States. The visa was

granted, and on February 18, 1954, appellant again entered the United States.

On April 30, 1954, appellant was served with a warrant of arrest in deportation proceedings which charged that he was subject to deportation by reason of returning to the United States without first having received the consent of the Attorney General. A deportation hearing was held on this charge on April 28, 1954, and May 25, 1954. On June 22, 1954, a Special Inquiry Officer ordered that appellant be deported, and further found that appellant was ineligible for the privilege of voluntary departure under 8 United States Code Section 1254(e).

No administrative appeal was taken of the June 22, 1954, decision. Instead, appellant petitioned the Special Inquiry Officer on October 29, 1955, to reopen and reconsider the said decision. On December 2, 1955, the Special Inquiry Officer denied the petition to reopen, and granted the petition to reconsider.

Appellant's petition to reconsider requested that he be granted *nunc pro tunc* permission to reapply for admission into the United States. The Special Inquiry Officer denied this request on two grounds: (1) appellant's failure to obtain permission to reapply before obtaining the Mexico City visa was deliberate and not inadvertent; (2) appellant gave false testimony on July 17, 1953, in connection with immigration matters.

An administrative appeal was taken from the denial of the *nunc pro tunc* request, and on April 4, 1956, the Board of Immigration Appeals affirmed the Special Inquiry Officer's decision in that respect by dismissing the appeal.

As the District Court determined in Finding No. IX, appellant waived his right to complain of the finding of

deportability and denial of voluntary departure made in the June 22, 1954, decision. This Finding is not questioned by appellant. Accordingly, the only question here involved is whether the denial of appellant's request for permission to reapply *nunc pro tunc* was arbitrary, and such is the only question argued by appellant in his brief.

Argument.

At the outset, it should be noted that the question involved is one dealing with the discretion of the Immigration and Naturalization Service, since there is no *right* to be granted permission to reapply for admission into the United States, after once having been deported. *A fortiori*, there is no right to be granted such permission *nunc pro tunc* after having illegally re-entered, as did appellant. Similar discretionary decisions have been held to be non-reviewable by the courts.

Anderson v. Holton, 242 F. 2d 596 (C. A. 7, 1957);

United States ex rel. Kaloudis v. Shaughnessy, 180 F. 2d 489 (C. A. 2, 1950).

Even if reviewed, it is readily apparent that the action of the Immigration and Naturalization Service must be upheld. As stated above, the first of the Special Inquiry Officer's reasons for denying the request for *nunc pro tunc* permission to reapply was that the appellant knew he was required to obtain permission to reapply before he applied for the Mexico City visa. In the deportation hearing of April 28, 1954, appellant at first stated he did not know it was necessary to obtain this permission:

"Q. Did you know that it was necessary to have this permission to reapply after deportation? A. No, I did not know.

* * * * *

Q. Why did you not wait for this permission from Washington before you made your application for your visa? A. I did not know it was necessary to have this permission."

Toward the close of the April 28, 1954, hearing, however, appellant seems to have made a slip:

"Q. Did he [your lawyer] not tell you that when the permission was received from Washington that he would send it to you in Mexico? A. No. All he told us was that he would send it to Washington and that *it was necessary to have this permission to make an application for an immigration visa* before returning to the United States.

* * * * *

Q. After departing from the United States in December, 1953 did you at any time attempt to contact Mr. Marcus concerning your permission to re-apply? A. Yes, I wrote him a letter from Mexico asking him what had happened to the permission and I never did receive an answer from him. *After waiting about two months my wife and I went ahead and obtained our visas."*

Perhaps it was in view of these revealing remarks that appellant reversed his position in the subsequent hearing of May 25, 1954, wherein he stated:

"Q. Mr. Marcus told you that you had to get permission from Washington before you could re-apply for a visa with which to enter the United States, is that correct? A. *Yes.*

Q. And you executed an application for that permission and gave it to Mr. Marcus and he was to send it to Washington, is that correct? A. *Yes.*

Q. But before you received that permission you applied for and obtained a visa with which you entered the United States, is that correct? A. *Yes."*

In view of the foregoing, it is very clear that there was abundant reason for the Special Inquiry Officer to find that appellant knew he could not lawfully apply for a visa or enter the United States without first having obtained permission from the Attorney General. On this ground alone, the denial of the request for *nunc pro tunc* permission to reapply is exceedingly proper.

The second reason given for the denial of appellant's request was that he had given false testimony in a prior hearing on July 17, 1953. At that time appellant falsely stated he had entered the United States only once before, falsely stated he had not been arrested by Immigration officers on any prior occasions, falsely stated he had not been arrested by police officers anywhere at any time and for any offense, and falsely stated that he had never used any name other than his own. The falsity of such testimony is not denied in appellant's brief. Instead it is argued that since appellant "immediately admitted" the true facts, it is improper for appellee to contend that such testimony constitutes "false swearing and the commission of perjury." (App. Br. p. 22.)

First of all, appellee need not argue that such testimony constitutes perjury or false swearing. The issue is not whether appellant committed perjury—it is whether the denial of discretionary relief to this alien was arbitrary. Thus it was proper to have considered, in determining whether to grant such relief, the fact that appellant testified falsely concerning immigration matters, whether or not the technical crime of perjury exists. The admitted

falsity is sufficient to take the denial out of the category of arbitrary actions even though there might have been a subsequent recantation.

However, no such recantation, as that term is employed by this Court, took place. Appellant's brief quotes from *Llanos-Senarillo v. United States*, 177 F. 2d 164 (C. A. 9, 1949). In that case the alien falsely answered questions under oath and corrected the falsity of the answers only after having been confronted with proof thereof. The full text of this Court's remarks is set forth below:

"The point depends upon the facts of the case. If the witness withdraws the false testimony *of his own volition* and without delay, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn. Such is not the case here. The withdrawal, if the circumstances justify the word, and the recanting, if appellant did recant, followed *only after he knew his false testimony would not deceive*. The reasons given for the false statements amount to confession and avoidance which cannot consider.

"United States v. Norris, *supra*, is an authoritative statement on the point and supports our view.

"We have assumed that appellant did recant his prior statements. To recant a prior statement or previous assertion is to renounce and withdraw it. It is doubtful on this record whether appellant ever so acted. Rather, the immigration inspector simply proved the contrary by conclusive documentary evidence and by appellant's admission that such evidence related to him." (Emphasis added.)

Under the foregoing clear-cut formula, appellant's testimony of July 17, 1953, set forth at pages 21-22 of his Opening Brief, must be analyzed. It is obvious that appellant would have continued to deny prior illegal entries and prior arrests by immigration officers and others, had not appellant learned the immigrant inspector had positive knowledge thereof. It was not until the inspector revealed that he knew the alias appellant had used on the occasion of prior arrests that appellant decided to "recant." Such a recantation hardly can amount to a *voluntary* withdrawal of the false testimony. Consequently, such false testimony is more than sufficient basis for denying appellant's request for *nunc pro tunc* permission to reapply.

An additional reason for such denial, which was advanced by the Board of Immigration Appeals, was that appellant was in this country illegally for the sixth time. On four occasions of prior illegal entry, appellant had been granted the privilege of voluntary departure in lieu of deportation. The previous privileges accorded appellant apparently did nothing but encourage him to repeat his offenses.

If the Immigration and Naturalization Service had granted appellant his request for *nunc pro tunc* permission to reapply for admission, the charge upon which he presently has been found subject to deportation (failure to have such permission prior to entry) would have been eliminated, and appellant would have been free to remain in the United States. In view of appellant's prior immigration record, this would have been absurd. Conse-

quently, the five previous illegal entries, standing alone, would have been ample reason for denying appellant the right to remain in the United States.

Conclusion.

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 15755

United States
Court of Appeals
for the Ninth Circuit

MERRIMAN H. HOLTZ and HELEN TYROLL
HOLTZ,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

DEC 11 1957

PAUL P. O'BRIEN, CLERK

No. 15755

United States
Court of Appeals
for the Ninth Circuit

MERRIMAN H. HOLTZ and HELEN TYROLL
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

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Portland, Oregon,
For the Petitioners.

CHARLES K. RICE,
Asst. U. S. Atty. Gen.;

LEE A. JACKSON,
Atty., Dept. of Justice,
Washington 25, D. C.,
For the Respondent.

The Tax Court of the United States

Docket No. 58455

MERRIMAN H. HOLTZ and HELENE TYROLL
HOLTZ,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1955

June 13—Petition received and filed. Petitioner notified. Fee paid.

June 14—Copy of petition served on General Counsel.

July 28—Answer filed by General Counsel.

July 28—Request for hearing in Portland, Oregon, filed by General Counsel.

Aug. 3—Notice issued placing proceeding on Portland, Oregon, calendar. Service of Answer and Request made.

1956

Feb. 17—Hearing set April 30, 1956, Portland, Oregon.

Apr. 13—Motion to continue to the next Portland, Oregon, calendar, filed by Petitioner. Granted April 16, 1956. Served April 17, 1956.

Nov. 26—Hearing set Feb. 18, 1957, Portland, Oregon.

1957

- Feb. 4—Hearing set Feb. 19, 1957, Portland, Oregon. Revised as to trial date.
- Feb. 19—Hearing had before Judge Withey on the merits. Submitted. Stipulation of Facts filed. Briefs due April 22, 1957. Reply Briefs due May 22, 1957.
- Apr. 8—Transcript of Hearing, 2/19/57, filed.
- Apr. 18—Motion for extension of time to May 6, 1957, to file brief, filed by Respondent. Granted 4/22/57. Served 4/25/57.
- Apr. 29—Brief filed by Petitioner. Served 5/7/57.
- May 6—Brief filed by Respondent. Served 5/7/57.
- June 6—Reply Brief filed by petitioner. Served 6/7/57.
- June 26—Memorandum Opinion rendered, Judge Withey. Decision will be entered for the respondent. Served 6/26/57.
- June 26—Decision entered, Judge Withey, Div. 4. Served 6/27/57.
- Sept. 17—Petition for Review by U. S. Court of Appeals for the Ninth Circuit, filed by petitioner.
- Sept. 17—Statement of Points, filed.
- Sept. 17—Designation of Contents of Record on Review, filed.
- Sept. 18—Proof of service of petition for review, Statement of Points and Designation of Contents of Record, filed.

The Tax Court of the United States

Docket No. 58455

MERRIMAN H. HOLTZ and HELENE TYROLL
HOLTZ,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols Ap:P:AA:REK 90D:LS), dated March 14, 1955, and as a basis of their proceeding allege as follows:

1. The petitioners are husband and wife, with residence at Portland, Oregon. The returns for the period here involved were filed with the Collector of Internal Revenue at Portland, Oregon.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on March 14, 1955.

3. The deficiency as determined by the Commissioner is in income taxes for the calendar years and in the amounts as follows:

Year	Income Tax Liability	Assessed	Deficiency
1949	\$ 958.30	—0—	\$ 958.30
1950	671.66	—0—	671.66
Totals	\$1,629.96	—0—	\$1,629.96

The entire amount of tax deficiency is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based on the following errors:

(a) The Commissioner erred in his determination that the deduction of \$83,316.29 claimed as a business bad debt in the return filed by the petitioners for the year 1950, represented a non-business bad debt under Section 23(k)(4) of the Internal Revenue Code of 1939, limited as a deduction to the extent provided in Sections 117(d)(2) and 117(e)(1) of the Internal Revenue Code of 1939.

(b) The Commissioner erred in his alternative contention that the deduction of \$83,316.29 claimed as a business bad debt was a loss not resulting in a net operating loss under the limitations prescribed by Section 122(d)(5) of the Internal Revenue Code of 1939.

5. The facts upon which the petitioners rely as a basis of this proceeding, are as follows:

The petitioner, Merriman H. Holtz, has for many years been engaged in organizing, financing, managing and participating in the operation of several corporations and businesses. The principal business of these corporations and businesses consisted of distribution, sale and rental of motion picture films and accessories, and related businesses.

The corporations were the Screen Adette Equipment Corporation, Screen Adettes Inc., and Pic-

tures Inc., all of which were organized under charters granted by the State of Oregon, and Audio Film Center was operated by the petitioner as an individual. The petitioner was also the principal stockholder and President of Helene's Inc., an Oregon corporation, operating a ladies apparel retail store in the City of Portland, Oregon. In addition to his activities in connection with these various corporations, during 1949 and 1950, as well as before and after those particular years, the petitioner engaged in the sale and rental of films and audio visual equipment operating as an individual. All of these activities, as above related, occupied his full time during the years 1949 and 1950.

The Commissioner in his deficiency has treated as a non-business bad debt the sum of \$83,316.29, which was deducted on petitioners' 1950 return. This deduction represents payments made in January and March, 1950, by the petitioners as guarantors to the United States National Bank of Portland, Oregon, on notes of the Screen Adette Equipment Corporation. This corporation was organized in 1945 to engage in the sale and distribution of motion picture equipment and accessories, with offices in Seattle, Washington; Portland, Oregon; San Francisco and Los Angeles, California. The petitioners were the owners of 500 of 503 shares of its outstanding capital stock, and was its President and General Manager. The loans made to this corporation by the United States National Bank were essential for the expansion required in con-

nection with its normal growth. The petitioners personally guaranteed these corporate loans and pledged as collateral for their guarantee, shares of common stocks then owned by them individually. In October, 1949, the corporation filed a voluntary petition in bankruptcy in the United States District Court for the District of Oregon, and said corporation never resumed any active business operation, and was dissolved by proclamation of the Governor of the State of Oregon on December 29, 1950. In the administration of the bankruptcy proceeding, creditors did not receive payment in full of their debts, and in fact received only .038 per cent upon such amounts as were due to them.

During the years 1949 and 1950, the petitioner was also President of Pictures Inc., an Oregon corporation, which was inactive since its incorporation in 1930, but which began its operations in the year 1949, and in which year petitioner advanced funds to this corporation as were required for working capital. The petitioners (husband and wife) owned 99 of the 100 outstanding shares of the capital stock of this corporation. During the years 1949 and 1950, the petitioners (husband and wife) owned 91 of the 100 outstanding shares of capital stock of Screen Adettes, Inc., an Oregon corporation. This corporation had been active for a number of years since its organization in 1932, and the petitioners made advances from time to time to the corporation for working capital. In October, 1949, a loan of \$1,000.00 was made, and this was

repaid in monthly installments in 1951. Merriman H. Holtz, one of the petitioners, was the President and managing officer of this corporation.

During the years 1949 and 1950, petitioners (husband and wife) were also the owners of 90 per cent of the outstanding capital stock of Helene's Inc., an Oregon corporation. For a considerable number of years, at least as far back as 1943, this corporation had borrowed funds from the bank for working capital. The amount of the loans outstanding during these periods varied from approximately \$10,000.00 to \$25,000.00. All of these bank loans were guaranteed by the petitioners, who had pledged as collateral to secure their guarantees, shares of common stocks owned by them, as well as life insurance policies carried on the lives of the petitioners. The corporation suffered increasingly substantial losses in its business after moving to a new location in 1947, and in 1949 all of its assets were sold and the corporation's creditors were paid approximately 50 per cent in full settlement of their debts. The final return of the corporation was filed for its fiscal year ending January 31, 1950.

Wherefore, the petitioners pray that this Court may hear the proceeding and determine:

(a) That the petitioners are not liable for additional income tax for the years 1949 and 1950, and that the petitioner's returns filed for 1949 and 1950 are proper and valid as filed.

(b) That the payment of \$83,316.29 to The United States National Bank of Portland by petitioners in January and March, 1950, entitles them to deduct said amount as a business bad debt resulting in a net operating loss and not limited under Section 122(d)(5) of the Internal Revenue Code of 1939.

/s/ MERRIMAN H. HOLTZ,

/s/ HELENE TYROLL HOLTZ,
Petitioners.

/s/ MOE M. TONKON,
Attorney for Petitioners.

Duly verified.

EXHIBIT A

Form 1230 (App.)

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
Appellate Division
P. O. Box 3935
Portland 8, Oregon

In Replying Refer to
Ap:P:AA:REK
90D:LS

Merriman H. and Helene Tyroll Holtz,
3707 S. W. Chehalem Street,
Portland, Oregon,

Dear Mr. and Mrs. Holtz:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1949 and December 31, 1950 discloses a deficiency or deficiencies of \$1,629.96 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, P. O. Box 3935, Portland 8, Oregon. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner,
Internal Revenue Service.

By /s/ A. N. WILLIAMS,
Associate Chief,
Appellate Division.

Enclosures:

Statement
Form 1276
Agreement Form

Statement

Ap:P:AA:REK

90D:LS

Merriman H. and Helene Tyroll Holtz
3707 S. W. Chehalem Street
Portland, Oregon

Tax liability for the taxable years ended December 31, 1949,
and December 31, 1950:

Income Tax

Year	Liability	Assessed	Deficiency
1949	\$ 958.30	—0—	\$ 958.30
1950	671.66	—0—	671.66
	<hr/>	<hr/>	<hr/>
Totals	\$1,629.96	—0—	\$1,629.96
	<hr/>	<hr/>	<hr/>

In making this determination of your income tax liability, careful consideration has been given to the report of examination transmitted September 17, 1952.

A copy of this letter and statement has been mailed to your representative, Mr. Moe M. Tonkon, Attorney, Public Service

Building, Portland 4, Oregon, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1949
Adjustments to Net Income

Net income as disclosed by return	\$7,920.19
Net income adjusted	\$7,920.19

Explanation of Adjustments

See Explanation of Adjustments for taxable year ended December 31, 1950.

Computation of Tax

Net income adjusted	\$7,920.19
Less: Exemptions	2,400.00
Balance subject to tax	\$5,520.19
One-half of \$5,520.19—joint return	\$2,760.10
Tentative tax on \$2,760.10	\$ 567.22
Less tax reduction: 17% of \$400.00	\$ 68.00
12% of \$167.22	20.07
Balance	\$ 479.15
Total tax liability—2 times \$479.15.....	\$ 958.30

Assessed:

Liability disclosed by return—original account No. 7606925—Oregon.....	\$958.30
Overassessment, allowance of tentative carry-back adjustment—9/12/51	
Schedule No. IT:CB:32637	(958.30)
Deficiency	\$ 958.30

Taxable Year Ended December 31, 1950

Adjustments to Net Income

Net income (loss) as disclosed by return	(\$76,656.23)
Unallowable deductions and additional income:	
(a) Bad debts disallowed	83,316.29
Total	<u>\$ 6,660.06</u>
Nontaxable income and additional deductions:	
(b) Capital loss allowed	1,000.00
Net income adjusted	<u><u>\$ 5,660.06</u></u>

Explanation of Items

(a) Bad debts disallowed:

It is determined that there is no net operating loss to be carried back to the year 1949 as explained below, and that there is a deficiency in tax of \$958.30 for that year due to the allowance of a tentative carry-back adjustment made under date of September 12, 1951.

It is determined that the deduction of \$83,316.29 claimed as a business bad debt in your return for the year 1950 represented a nonbusiness bad debt under Section 23(k)(4) of the Internal Revenue Code of 1939 limited as a deduction to the extent provided in Sections 117(d)(2) and 117(e)(1) of the Internal Revenue Code of 1939.

In the alternative it is held that the deduction represented a loss in a transaction entered into for profit under Section 23(e)(2) of the Internal Revenue Code of 1939 and that such loss does not result in a net operating loss under the limitations prescribed by Section 122(d)(5), Internal Revenue Code of 1939.

(b) Capital loss allowed:

Since the 1950 return reflects a net operating loss, no capital loss was deducted in accordance with the provisions of Section 122(d)(4), 1939 Internal Revenue Code. Adjustment (a), above, eliminates any 1950 net operating loss, and the maximum capital loss deduction of \$1,000.00 is allowed under the provisions of Section 117(d)(2), 1939 Internal Revenue Code. As shown by the return, capital loss carry-overs to 1950 exceeded 1950 capital gain by more than \$1,000.00.

Computation of Tax

Net income adjusted	\$5,660.06
Less: Exemptions	1,800.00
Balance subject to tax	<u>\$3,860.06</u>
One-half of \$3,860.06—joint return	<u>\$1,930.03</u>
Tentative tax on \$1,930.03	\$ 386.01
Less tax reduction—13% of \$386.01	50.18
Balance	<u>\$ 335.83</u>
Total tax liability—2 times \$335.83	<u>\$ 671.66</u>
Assessed:	
Liability disclosed by return—original account No. 7511064—Oregon	<u>—0—</u>
Deficiency	<u><u>\$ 671.66</u></u>

Received and filed June 13, 1955, T.C.U.S.

Served June 14, 1955.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations of paragraph 1 of the petition.
2. Admits the allegations of paragraph 2 of the petition.

3. Admits the allegations of paragraph 3 of the petition.

4. Denies the allegations of paragraph 4 of the petition.

5. Admits that the corporations were the Screen Adette Equipment Corporation, Screen Adettes Inc., and Pictures Inc., all of which were organized under charters granted by the State of Oregon, and Audio Film Center was operated by the petitioner as an individual. Admits that the petitioner was also the principal stockholder and president of Helene's Inc., an Oregon corporation, operating a ladies' apparel retail store. Admits that the Commissioner in his deficiency has treated as a non-business bad debt the sum of \$83,316.29 which was deducted on petitioners' 1950 return. Admits that Screen Adette Equipment Corporation was organized in 1945 to engage in the sale and distribution of motion picture equipment and accessories, with offices in Seattle, Portland, San Francisco, and Los Angeles. Admits that the petitioners were the owners of 500 of 503 shares of its outstanding capital stock and were its president and general manager. Admits that in October, 1949 the Screen Adette Equipment Corporation filed a voluntary petition in bankruptcy in the United States District Court for the District of Oregon, and was dissolved by proclamation of the Governor of the State of Oregon on December 29, 1950. Admits that during the years 1949 and 1950 the petitioner was also president of Pictures Inc., an Oregon corpora-

tion, which was inactive since its incorporation in 1930, but which began its operations in the year 1949. Admits that the petitioners owned 99 of the 100 outstanding shares of the capital stock of Pictures Inc. Admits that during the years 1949 and 1950 the petitioners owned 91 of the 100 outstanding shares of the capital stock of Screen Adettes Inc., an Oregon corporation, and that this corporation had been active for a number of years since its organization in 1932. Admits that the petitioner, Merriman H. Holtz was the president and managing officer of Screen Adettes Inc. Admits that during the years 1949 and 1950 the petitioners were also the owners of 90 per cent of the outstanding stock of Helene's Inc., an Oregon corporation. Denies the remaining allegations of paragraph 5 of the petition.

6. Denies generally each and every allegation of the petition not hereinabove specifically admitted, qualified, or denied.

Wherefore, it is prayed that the relief sought in the petition be denied and that the deficiencies in income tax, as set forth in the notice of deficiency, be in all respects approved.

/s/ JOHN POTTS BARNES,
Chief Counsel.

Filed July 28, 1955, T.C.U.S.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between the parties hereto, appearing by and through their respective attorneys of record, that the following facts are true, and that the same may be so considered and accepted by the Court as offered in evidence by the parties at the trial in the above entitled case:

1. The petitioners are husband and wife, and have had their residence in Portland, Oregon since prior to 1930, except for the years 1943 to 1945 when Merriman H. Holtz, one of the petitioners, temporarily resided in Washington, D. C., at which time he was specially appointed to handle the distribution of 16 mm. films in connection with the promotion and sale of war bonds for the Treasury Department.

2. The tax years in controversy are the calendar years 1949 and 1950. Petitioners executed joint income tax returns for these years, prepared on a cash basis, and duly filed same with the then Collector of Internal Revenue at Portland, Oregon. Photostat copies of these returns are attached hereto as Exhibits 1-A and 2-B. Petitioners claimed deduction of \$83,316.29 on their 1950 return as "bad debts arising from sales or services." This deduction was explained in Schedule C-2 of the return as "payments made to the U. S. National Bank as guarantor of business debts." Respondent determined that the amount of \$83,316.29 represented a

non-business bad debt, not a business bad debt as claimed by petitioners, and accordingly disallowed the deduction so claimed. Respondent treated this amount as a non-business bad debt under Section 23(k)(4) of the Internal Revenue Code of 1939.

3. The deduction of \$83,316.29 represented payments made in January and March of 1950 by the petitioners as guarantors to the U. S. National Bank of Portland, Oregon, on notes of Screen Adette Equipment Corporation. Attached hereto as Exhibits 3-C and 4-D are photostat copies of letters dated January 11, 1950 and March 8, 1950 from the U. S. National Bank of Portland, Oregon to the petitioner Merriman H. Holtz.

This corporation was organized in 1945 to engage in the sale and distribution of motion picture equipment and accessories, and has its offices in Seattle, Washington; Portland, Oregon; San Francisco and Los Angeles, California. Petitioners were the owners of 500 of the 503 shares of its stock outstanding. The petitioner Merriman H. Holtz was president, general manager, and actively engaged in its operation. In addition to the original capital invested by petitioners, sums were required in connection with its operation, normal growth and expansion. The corporation obtained these sums from the U. S. National Bank of Portland, Oregon. The loans were personally guaranteed by the petitioner Merriman H. Holtz who pledged as collateral certain listed common stocks then owned by the petitioners and having a then market value sub-

stantially in excess of the market value of the loans. Attached hereto as Exhibit 5-E are photostat copies of the bank's ledger pages showing the account of the corporation and its borrowings, all of which were guaranteed by the petitioner Merriman H. Holtz.

In October, 1949 the corporation filed a voluntary petition in bankruptcy in the U. S. District Court for the District of Oregon. Thereafter it never resumed business operations and was dissolved by proclamation of the Governor of the State of Oregon on December 29, 1950. In the bankruptcy proceeding the creditors received 0.038 per cent upon claims filed by them. In January and March of 1950 the U. S. National Bank of Portland, Oregon, sold the collateral securities pledged by the petitioners as guarantors for the indebtedness of the corporation. The bank realized \$83,-316.29 from the sale of the securities, which amount was applied toward the indebtedness of the corporation.

Sale of the securities by the bank was made at a time when the market was at its lowest due to the commencement of the Korean conflict. The proceeds from the sale of the securities were not sufficient to satisfy the loans in full and there remained owing by the petitioners upon their guaranty the amount of \$64,119.34. At the time the collateral was pledged with the bank, the market value of the securities was substantially in excess of the loans.

4. In 1932 petitioners organized Screen Adettes Inc., an Oregon corporation. In 1949 and 1950 they owned 91 of the 100 shares of capital stock outstanding. The corporation has been engaged in the distribution and sale of 16 mm. films from its inception. In 1949 and 1950 it sold audio visual equipment and accessories in addition to distributing 16 mm. films. Petitioners made advances from time to time to this corporation for working capital. In October, 1949 a loan of \$1,000.00 was made. This was repaid in monthly installments during the year 1951. In addition the corporation borrowed money from time to time from the U. S. National Bank of Portland, Oregon. These loans were personally guaranteed by the petitioner Merriman H. Holtz. Attached herewith as Exhibit 6-F are copies of the bank ledger pages showing the account of the corporation and its borrowings. The petitioner Merriman H. Holtz was president and managing officer of the corporation. He was actively engaged in its affairs.

5. During the years 1949 and 1950 the petitioner Merriman H. Holtz was president of Pictures Inc., an Oregon corporation. This company was organized in 1930 and remained inactive until 1949 when it began operations involving the sale and distribution of 16 mm. films in the Territory of Alaska. The company has been in operation from 1949 to date. The petitioner Merriman H. Holtz was the manager of the business and advanced funds to the corporation as required for its operation.

Petitioners owned 99 of the 100 outstanding shares of capital stock of the corporation in 1949 and 1950.

6. The petitioner Merriman H. Holtz was engaged in the sale and distribution of audio visual equipment and accessories as an individual proprietorship for part of the year 1950. He continued to operate this business in 1951 and subsequent years. The gross profit from this business in 1950 was \$2,066.05. In 1951 the gross profit from this business amounted to \$4,911.88 and the net income was \$2,450.76. In 1952 the sales and gross profit of this business were \$18,606.79 and \$4,479.20, respectively. It was necessary on occasion for petitioner Merriman H. Holtz to borrow sums from the U. S. National Bank of Portland, Oregon, in connection with the operation of this business, and on these occasions he would assign invoices representing sales of equipment to the bank as collateral.

7. In 1950 the petitioner Merriman H. Holtz was employed on a part-time basis at a fixed salary to sell 16 mm. films for Audio Film Center, an association that operated a film rental library in Portland, Oregon. This employment ceased in 1953. The petitioners had no proprietary interest in this association.

8. Petitioners were the owners of 90 per cent of the outstanding capital stock of Helene's Inc., an Oregon corporation, for many years prior to 1949 and 1950. This company has been engaged in the operation of a ladies' apparel retail store in

Portland, Oregon. This company borrowed various sums from the U. S. National Bank of Portland, Oregon over the years in connection with the operation of the business. The loans varied from approximately \$10,000.00 to \$25,000.00. The loans were guaranteed by the petitioner Merriman H. Holtz who pledged as collateral therefor certain listed common stocks owned by petitioners as well as life insurance policies carried on their life. Attached hereto as Exhibit 7-G are photostat copies of the bank's ledger pages showing the account of the corporation and its borrowings, all of which were guaranteed by the petitioners.

The corporation suffered substantial losses in its business after moving to a new location in 1947. In 1949 all of its assets were sold and the creditors were paid approximately 50 per cent in full settlement of their debts. In 1950 the final return of the corporation was filed for the fiscal year ending January 31, 1950. The petitioner Merriman H. Holtz was president and actively engaged in the business until operations terminated.

9. Attached hereto as Exhibit 8-H is a copy of the guaranty agreement executed by the petitioner, Merriman H. Holtz, and the U. S. National Bank of Portland, Oregon. Attached hereto as Exhibit 9-I is a collateral agreement executed by the petitioner, Merriman H. Holtz, and the U. S. National Bank of Portland. Attached hereto as Exhibit 10-J are the receipts for securities pledged by the petitioner, Merriman H. Holtz, to cover loans made by the bank

to the organizations described in the preceding paragraphs.

10. Attached hereto as Exhibits 11-K and 12-L are photostat copies of petitioners' income tax returns for 1951 and 1952.

11. The petitioner, Merriman H. Holtz, has been active since 1930 in the industry relating to the sale and distribution of 16 mm. films and audio visual equipment, supplies and accessories. He was one of the founders of the National Association of Visual Education Dealers, a national trade organization, which was formed in 1939 and is still in existence at the present time. He served as a member of the Board of Directors and as vice-president of the association from 1939 to 1948, and in 1948 and 1949 served as president thereof.

12. The attached exhibits shall be considered as having been offered and received in evidence in this proceeding.

/s/ MOE M. TONKON,
Counsel for Petitioners.

/s/ HERMAN T. REILING,
Acting Chief Counsel, Internal Revenue Service,
Counsel for Respondent.

Filed February 19, 1957, T.C.U.S.

The Tax Court of the United States
Washington

Docket No. 58455

MERRIMAN H. HOLTZ and HELENE TYROLL
HOLTZ,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion, filed June 26, 1957, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1949 and 1950 in the amounts of \$958.30 and \$671.66, respectively.

[Seal] /s/ G. G. WITHEY,
Judge.

Entered June 26, 1957.

Served June 27, 1957.

Entered June 27, 1957.

[Title of Tax Court and Cause.]

MEMORANDUM OPINION

Withey, Judge:

The respondent determined deficiencies in petitioners' income tax for the years and in the amounts as follows:

Year	Amount
1949	\$958.30
1950	671.66

The sole issue presented for our determination is the correctness of the respondent's action in determining that losses sustained by petitioners during 1950 as the result of discharging a guaranty on bank loans made to a corporation controlled by them are not deductible as business bad debts under section 23(k)(1) of the Internal Revenue Code of 1939, but are deductible only as nonbusiness bad debts pursuant to section 23(k)(4) of the 1939 code.

All of the facts have been stipulated and are found accordingly.

Petitioners, husband and wife, residing in Portland, Oregon, filed their joint income tax returns for 1949 and 1950 with the collector for the district of Oregon at Portland, Oregon. Inasmuch as the activities of Merriman H. Holtz are those with which we are here primarily concerned, "petitioner" or "Holtz" as hereinafter used has reference to him.

Petitioner has been engaged since 1930 in the business of selling and distributing 16 millimeter

film, audio visual equipment, supplies and accessories.

In 1930, petitioner organized Pictures, Inc., under the laws of the State of Oregon. Pictures, Inc., was inactive until 1949 when it began the sale and distribution of 16 millimeter films in the Territory of Alaska. The corporation has continued in operation since 1949. Holtz was the manager of Pictures, Inc., and advanced to it the funds required for its operation. During 1949 and 1950, petitioners owned 99 of the 100 outstanding shares of capital stock of the aforementioned corporation.

During 1932, petitioner organized Screen Adettes, Inc., pursuant to the laws of the State of Oregon. Since the time of its organization, Screen Adettes, Inc., has been engaged in the sale and distribution of 16 millimeter films in Oregon. During 1949 and 1950, petitioners owned 91 of the 100 shares of outstanding capital stock of Screen Adettes, Inc. Petitioner occasionally made advances to this corporation for working capital. In addition, Screen Adettes, Inc., on several occasions borrowed money from the United States National Bank of Portland, Oregon. All such loans were personally guaranteed by Holtz, who was president and managing officer of Screen Adettes, Inc., and was actively engaged in its affairs.

In 1945, petitioner organized Screen Adette Equipment Corporation under the laws of Oregon for the purpose of engaging in the sale and distribu-

tion of motion picture equipment and accessories on the Pacific coast. Petitioners were the owners of 500 of 503 shares of its outstanding stock. Holtz was president and general manager of the corporation and was actively engaged in conducting its operations. In addition to the original capital invested by petitioners, Screen Adette Equipment Corporation obtained working capital from the United States National Bank of Portland, Oregon. The amounts so obtained were in the form of loans which were personally guaranteed by Holtz who pledged as collateral certain shares of listed common stock owned by petitioners. At the time they were pledged by petitioner, the foregoing shares had a market value substantially in excess of the value of the loans.

In October, 1949, Screen Adette Equipment Corporation filed a voluntary petition in bankruptcy with the United States District Court for the District of Oregon. The corporation thereafter ceased its operations and was dissolved by proclamation of the Governor of the State of Oregon on December 29, 1950. Pursuant to the bankruptcy proceeding, creditors of Screen Adette Equipment Corporation received only 0.038 per cent upon the claims filed by them.

In January and March of 1950, the United States National Bank of Portland sold the collateral securities pledged by the petitioner as guarantor for the indebtedness of Screen Adette Equipment Corporation. The bank realized \$83,316.29 from the sale of the securities which was applied against the indebtedness of the corporation. Consequently, peti-

tioner was indebted to the bank in the amount of \$64,119.34 upon his guaranty.

Hotz was engaged as sole proprietor in the sale and distribution of audio visual equipment during part of 1950. In addition, during 1950, petitioner was employed on a part-time basis to sell 16 millimeter films for Audio Film Center, an association which operated a film rental library in Portland, Oregon.

Petitioners were the owners of 90 per cent of the outstanding capital stock of Helene's, Inc., for many years prior to 1949. Helene's, Inc., was a corporation engaged in the operation of a ladies retail apparel store in Portland, Oregon. Petitioner was president and was active in the management of Helene's, Inc. After moving to a new location in 1947, Helene's, Inc., experienced substantial losses and in 1949 all of its assets were sold. Creditors of Helene's, Inc., received approximately 50 per cent of their claims in full settlement.

During the years of its operation prior to 1949, Helene's, Inc., had borrowed various amounts from the United States National Bank of Portland for use as working capital. Such loans were guaranteed by Holtz who pledged as collateral certain listed common stocks and life insurance policies owned by petitioners.

Petitioners claimed a deduction in the amount of \$83,316.29 on their joint income tax return for 1950 as "Bad debts arising from sales or services." This deduction was explained in Schedule C-2 of peti-

tioners' 1950 return as "Payments made to U. S. National Bank as guarantor of business debt." The foregoing deduction represented payments made by petitioner in January and March of 1950 as guarantor on the notes of Screen Adette Equipment Corporation.

The respondent does not question the worthlessness of the indebtedness in issue or the year in which it is deducted as worthless, but has determined that petitioners are not entitled to the aforementioned bad debt deduction because the debt was not incurred in the conduct of petitioner's trade or business. The respondent therefore contends that petitioner's loss resulting from his guaranty on the notes of Screen Adette Equipment Corporation must be treated as a nonbusiness bad debt pursuant to the limitations of section 23(k)(4) of the 1939 Code.

The petitioners contend that Holtz was engaged in the business of promoting, organizing, financing and managing corporations during the years in issue and that the guaranty obligation on behalf of Screen Adette Equipment Corporation was incurred in the conduct of that business. They accordingly take the position that the loss in the amount of \$83,316.29 is deductible in full as a business bad debt under section 23(k)(1) of the 1939 Code.

The issue here presented depends for its resolution on the determination as to whether or not petitioner was engaged in a trade or business of his own during 1949 and 1950 to which the indebtedness in

question was proximately related. Robert Cluett, III, 8 T.C. 1178; Charles G. Berwind, 20 T.C. 808, *affd.* 211 F.2d 575; Jan G. Boissevain, 17 T.C. 325. If the indebtedness in question was not proximately related to petitioner's trade or business at the time it became worthless, it is deductible only as a non-business bad debt under section 23(k)(4) of the 1939 Code.

It is settled law that the business of a corporation is not the business of its officers. *Burnet v. Clark*, 287 U.S. 410; Jan G. Boissevain, *supra*.

However, a worthless debt, resulting from a loan by a stockholder to his corporation, may qualify as a business bad debt if the stockholder was engaged in promoting, organizing, financing and managing business enterprises. Henry E. Sage, 15 T.C. 299; Vincent C. Campbell, 11 T.C. 510; Langdon L. Skarda, 27 T.C. 137; *Giblin v. Commissioner*, 227 F.2d 692, reversing a Memorandum Opinion of this Court, decided October 29, 1954.

The authority of the foregoing line of decisions is applicable only in the exceptional situations in which the taxpayer's activities in promoting, managing and making loans or contributions to a variety of businesses may be regarded as so extensive as to constitute a business separate and distinct from the business carried on by the enterprises themselves. Charles G. Berwind, *supra*. In Vincent C. Campbell, *supra*, for example, in which we held that the taxpayers were in the business of organizing and operating corporations engaged in the retail coal

business, it was shown that from 1929 through 1944 the taxpayer had organized, managed and financed 12 corporations. In *Giblin v. Commissioner*, *supra*, the taxpayer, a practicing attorney on 11 or 12 occasions between 1926 and 1945, contributed his time and money to the development of various enterprises and business ventures. The United States Court of Appeals for the Fifth Circuit there held that the taxpayer was engaged in the business of promoting or dealing in business enterprises.

Petitioner has been engaged in the sale and distribution of motion picture films and equipment since 1930. During this period he carried on his activities through 4 separate business units: (1) Screen Adettes, Inc., a corporation engaged in the sale and distribution of 16 millimeter films in the State of Oregon; (2) Pictures, Inc., engaged in the sale and distribution of 16 millimeter films in the Territory of Alaska; (3) Screen Adette Equipment Corporation engaged in the sale and distribution of motion picture equipment and accessories; and (4) an individual proprietorship business conducted by petitioner for the purpose of selling audio visual equipment and accessories. In addition, the petitioners owned 90 per cent of the stock of Helene's, Inc., a ladies' retail apparel store.

Holtz frequently advanced funds to the aforementioned corporations, endorsed corporate notes or guaranteed bank loans to provide them with working capital, and was active in the management of their operations.

Early in 1950, the United States National Bank of Portland sold the securities pledged by petitioner as guarantor on loans made to the Screen Adette Equipment Corporation and realized \$83,316.29 from their sale. The proceeds were applied to the indebtedness of the corporation, resulting in losses to petitioner in the amount of \$83,316.29. Consequently, it is apparent that the losses in question were not incurred in or proximately related to the individual proprietorship business operated by petitioner during 1950. Moreover, insofar as we are able to determine from the record herein, the advances made by petitioner to the Screen Adette Equipment Corporation and the bank loans guaranteed by him were for the purpose of assisting that corporation in its business of selling motion picture equipment and accessories.

The history of petitioner's business in connection with the foregoing 3 corporations discloses no more than the customary activity of an individual who has devoted himself to carrying on a business enterprise by means of wholly-owned corporations. We do not think that the activities outlined herein are sufficiently extensive to establish the existence of a separate business of promoting, organizing, financing and managing businesses during 1950. Cf. *Dominick J. Salomone*, 27 T.C. 663; *Commissioner vs. Smith*, 203 F.2d 310, reversing 17 T.C. 135; *Hickerson vs. Commissioner*, 229 F.2d 631, affirming a Memorandum Opinion of this Court, decided December 29, 1954. Accordingly, on the evidence presented, we

are unable to find that the indebtedness in question bore a proximate relationship to the petitioner's trade or business either at the time the loan was made or at the time it became worthless. The losses in issue must therefore be treated as nonbusiness bad debts under section 23(k)(4) of the 1939 Code.

Decision will be entered for the respondent.

Served June 26, 1957.

Entered June 26, 1957.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 58455

MERRIMAN H. HOLTZ and HELENE TYROLL
HOLTZ,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

Merriman H. Holtz and Helene Tyroll Holtz, Petitioners, by Moe M. Tonkon, Attorney, hereby file their petition for a review by the United States Court of Appeals, for the Ninth Circuit, of the decision of the Tax Court of the United States entered on June 26, 1957, (TC Memo 1957-106), determining a deficiency in Petitioners' 1949 and

1950 income taxes in the amounts of \$958.30 and \$671.66, respectively.

I.

Petitioners, husband and wife, filed their joint income returns for the years 1949 and 1950 with the Collector of Internal Revenue for the District of Oregon at Portland, Oregon, and at all times during said years and since, have been and now are residents of the City of Portland, Oregon.

II.

Nature of Controversy

The controversy involves the proper determination of Petitioners' income taxes for the years 1949 and 1950.

During the period 1930-1950, Petitioners organized, financed, operated and managed several corporations and a single proprietorship business. The principal activity of these enterprises consisted of the distribution, sale, and rental of motion picture equipment, accessories and film. In connection with the aforesaid financing activity, Petitioners advanced funds to these enterprises and on numerous occasions personally guaranteed their borrowings from banks.

In 1950, Petitioners paid to The United States National Bank of Portland (Oregon), the sum of \$83,316.29 as guarantors on notes of one of the corporations which they had organized, operated, financed and managed. This payment was treated as a business bad debt deduction on Petitioners' joint

income tax return for 1950. The Commissioner disallowed the deduction of this amount as a business bad debt fully deductible under Section 23(k)(1) of the Internal Revenue Code of 1939, and held that the payment represented a non-business bad debt, deductible as provided by Section 23(k)(4), hence to be treated as a short term capital loss, with resultant limited deductibility. The Tax Court of the United States sustained the Commissioner.

III.

The Petitioners being aggrieved by the findings of fact and conclusions of law contained in the findings and opinion of the Tax Court of the United States, and by its decision entered pursuant thereto, do hereby petition for a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ MOE M. TONKON,
Attorney for Petitioners.

Duly verified.

Received and filed September 17, 1957, T.C.U.S.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Commissioner of Internal Revenue, Internal
Revenue Service, Washington, D. C.

You are hereby notified that the Petitioners have filed with the Clerk of the Tax Court of the United

States at Washington, D. C., a Petition for Review of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the Petition for Review is hereto attached and served upon you.

There is also herewith enclosed:

(a) Designation of contents of Record on Review directed to the Clerk of the Tax Court of the United States.

(b) Statement of Points to be urged on appeal.

Dated at Portland, Oregon, this 16th day of September, 1957.

Respectfully,

/s/ MOE M. TONKON,
Attorney for Petitioners.

Service of copy acknowledged.

Received September 17, 1957.

Filed September 18, 1957, T.C.U.S.

[Title of Tax Court and Cause.]

STATEMENT OF POINTS

Come now the Petitioners above named, by their attorney, Moe M. Tonkon, and hereby assert the following errors which they intend to urge upon review of the United States Court of Appeals for the Ninth Circuit, of the decision of the Tax Court of

the United States on June 26, 1957, rendered in Docket No. 58455.

1. The Tax Court erred in holding that any deficiency exists with respect to Petitioners' income tax liability for the calendar years 1949 and 1950.

2. The Tax Court erred in holding that the activities of Petitioner, Merriman H. Holtz, during the period 1930-1950, inclusive, did not constitute the business of organizing, financing and managing businesses.

3. The Tax Court erred in holding that the activities of Petitioner, Merriman H. Holtz, during the period 1930-1950, were not sufficiently extensive to establish the existence of the business of organizing, financing and managing businesses.

4. The Tax Court erred in holding that the indebtedness in question did not bear a proximate relationship to Petitioners' trade or business either at the time the loan was made or at the time it became worthless.

5. The Tax Court erred in sustaining the Commissioner's disallowance of the business bad debt petitioners had deducted upon their 1950 income tax return under the provisions of Section 23(k)(1) of the Internal Revenue Code of 1939, in the sum of \$83,316.29, being payment made to The United States National Bank of Portland as guarantors on notes to one of the corporations which Petitioners had organized, operated, financed, and managed, and conversely the Tax Court erred in holding such

payment by Petitioners was a non-business bad debt deductible only as provided by Section 23(k)(4), Internal Revenue Code of 1939.

6. The Tax Court erred in that its opinion and decision are not supported by the facts and are contrary to law.

/s/ MOE M. TONKON,
Attorney for Petitioners.

Filed September 17, 1957, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 10, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review," including exhibits 1-A thru 12-L, attached to the Stipulation of Facts, in the case before the Tax Court of the United States docketed at the above number and in which the petitioners in the Tax Court have filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United

States, at Washington, in the District of Columbia,
this 26th day of September, 1957.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15755. United States Court of
Appeals for the Ninth Circuit. Merriman H. Holtz
and Helene Tyroll Holtz, Petitioners, vs. Commis-
sioner of Internal Revenue, Respondent. Transcript
of the Record. Petition to Review a Decision of The
Tax Court of the United States.

Filed October 8, 1957.

Docketed: October 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

MERRIMAN H. HOLTZ AND HELEN TYROLL HOLTZ,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the
Tax Court of the United States

BRIEF FOR THE RESPONDENT

CHARLES K. RICE,
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LEE A. JACKSON,
HARRY BAUM,
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Attorneys,
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Washington 25, D. C.

FILED

FEB 13 1958

PAUL P. O'BRIEN, CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15755

MERRIMAN H. HOLTZ AND HELEN TYROLL HOLTZ,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 26-34) is not officially reported.

JURISDICTION

This petition for review (R. 34-36) involves deficiencies in federal income taxes for the calendar years 1949 and 1950 in the respective amounts of \$958.30 and \$671.66 (R. 26). A notice of deficiency was mailed to the taxpayers on March 14, 1955. (R. 5, 10-15.) On June 13, 1955, the taxpayers filed a petition for redetermination of these deficiencies under the provisions of Section 272(a) of the In-

ternal Revenue Code of 1939. (R. 3, 5-10.) The decision of the Tax Court was entered on June 26, 1957. (R. 4, 25.) The case is brought to this Court by a petition for review filed by the taxpayers¹ on September 17, 1957. (R. 4, 34-39.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court erred in determining that a loss resulting from the taxpayer's guaranty of loans made to a corporation of which he was the controlling stockholder was deductible by him as a non-business bad debt under Section 23(k)(4) of the Internal Revenue Code of 1939, rather than as a business bad debt under Section 23(k)(1).

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(k) [As amended by Sec. 124(a), Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 113 (a), Revenue Act of 1943, c. 63, 58 Stat. 21]
Bad Debts.—

(1) *General rule.*—Debts which become worthless within the taxable year; or (in

¹ Since Helen Tyroll Holtz, the wife of Merriman H. Holtz, is involved solely because of the filing of joint tax returns for the taxable years (R. 18), her husband hereinafter will be referred to, individually, as the taxpayer.

the discretion of the Commissioner) a reasonable addition to a reserve for bad debts; and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. This paragraph shall not apply in the case of a taxpayer, other than a bank, as defined in section 104, with respect to a debt evidenced by a security as defined in paragraph (3) of this subsection. This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection.

* * * *

(4) *Non-business debts*.—In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term “non-business debt” means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of which is incurred in the taxpayer’s trade or business.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(k)-6 [As amended by T. D. 5458, 1945 Cum. Bull. 45]. *Non-Business Bad Debts*.

—In the case of a taxpayer, other than a corporation, if a non-business bad debt becomes entirely worthless within a taxable year beginning after December 31, 1942, the loss resulting therefrom shall be treated as a loss from the sale or exchange of a capital asset held for not more than six months. Such a loss is subject to the limitations provided in section 117 with respect to gains and losses from the sale and exchange of capital assets. A loss with respect to such a debt will be treated as sustained only if and when the debt has become totally worthless, and no deduction shall be allowed for a non-business debt which is recoverable in part during the taxable year. Nor are the provisions of this subdivision applicable in the case of a loss resulting from a security as defined in section 23(k)(3). A non-business debt is a debt, other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business and other than a debt evidenced by a security as that term is defined in section 23(k)(3). The question whether a debt is one the loss from the worthlessness of which is incurred in the taxpayer's trade or business is a question of fact in each particular case. The determination of this question is substantially the same as that which is made for the purpose of ascertaining whether a loss from the type of transaction covered by section 23(e) is "incurred in trade or business" under paragraph (1) of that section.

The character of the debt for this purpose is not controlled by the circumstances attending its creation or its subsequent acquisition by the taxpayer or by the use to which the borrowed funds

are put by the recipient, but is to be determined rather by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer. If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, the debt is not a non-business debt for the purposes of this section.

* * * *

STATEMENT

The facts as stipulated (R. 18-24) and as found by the Tax Court (R. 26-34) may be summarized as follows:

The taxpayer and his wife, residing in Portland, Oregon, filed their joint income tax returns for 1949 and 1950 with the then Collector of Internal Revenue for the District of Oregon at Portland, Oregon. (R. 26.)

The taxpayer has been engaged since 1930 in the business of selling and distributing 16 millimeter film, audio visual equipment, supplies and accessories. (R. 26-27.)

In 1930 the taxpayer organized Pictures, Inc., under the laws of the State of Oregon. Pictures, Inc., was inactive until 1949 when it began the sale and distribution of 16 millimeter films in the Territory of Alaska. The corporation has continued in operation since 1949. The taxpayer was the manager of Pictures, Inc., and advanced to it the funds required for its operation. During 1949 and 1950 the taxpayer owned 99 of the 100 outstanding shares of capital stock of the corporation. (R. 27.)

During 1932 the taxpayer organized Screen Adettes, Inc., pursuant to the laws of the State of Oregon. Since the time of its organization, Screen Adettes, Inc., has been engaged in the sale and distribution of 16 millimeter films in Oregon. During 1949 and 1950 the taxpayer owned 91 of 100 shares of outstanding capital stock of Screen Adettes, Inc. The taxpayer occasionally made advances to this corporation for working capital. In addition, Screen Adettes, Inc., on several occasions borrowed money from the United States National Bank of Portland, Oregon. All such loans were personally guaranteed by the taxpayer, who was president and managing officer of Screen Adettes, Inc., and was actively engaged in its affairs. (R. 27.)

In 1945 the taxpayer organized Screen Adette Equipment Corporation, under the laws of Oregon, for the purpose of engaging in the sale and distribution of motion picture equipment and accessories on the Pacific coast. He was the owner of 500 of 503 shares of its outstanding stock. The taxpayer was president and general manager of the corporation and was actively engaged in conducting its operations. In addition to the original capital invested by the taxpayer, Screen Adette Equipment Corporation obtained working capital from the United States National Bank of Portland, Oregon. The amounts so obtained were in the form of loans which were personally guaranteed by the taxpayer, who pledged as collateral certain shares of listed common stock owned by him. (R. 27-28.) The funds were needed to assist the corporation in its business. (R. 19.)

At the time the foregoing shares were pledged by the taxpayer, they had a market value substantially in excess of the value of the loans. (R. 28.)

In October, 1949, Screen Adette Equipment Corporation filed a voluntary petition in bankruptcy with the United States District Court for the District of Oregon. The corporation thereafter ceased its operations and was dissolved by proclamation of the Governor of the State of Oregon on December 29, 1950. Pursuant to the bankruptcy proceeding, creditors of Screen Adette Equipment Corporation received only 0.038% upon the claims filed by them. (R. 28.)

In January and March of 1950 the United States National Bank of Portland sold the collateral securities pledged by the taxpayer as guarantor for the indebtedness of Screen Adette Equipment Corporation. The bank realized \$83,316.29 from the sale of the securities which amount was applied against the indebtedness of the corporation. Consequently, the taxpayer was indebted to the bank in the amount of \$64,119.34 upon his guaranty. (R. 28-29.)

The taxpayer was engaged as a sole proprietor in the sale and distribution of audio visual equipment during part of 1950. In addition, during 1950 he was employed on a part-time basis to sell 16 millimeter films for Audio Film Center, an association which operated a film rental library in Portland, Oregon. (R. 29.)

The taxpayer was the owner of 90% of the outstanding capital stock of Helene's, Inc., for many years prior to 1949. Helene's, Inc., was a corpora-

tion engaged in the operation of a ladies' retail apparel store in Portland, Oregon. The taxpayer was president and was active in the management of Helene's, Inc. After moving to a new location in 1947, Helene's, Inc., experienced substantial losses, and in 1949 all of its assets were sold. Creditors of Helene's, Inc., received approximately 50% of their claims in full settlement. (R. 29.)

During the years of its operation prior to 1949, Helene's, Inc., had borrowed various amounts from the United States National Bank of Portland for use as working capital. Such loans were guaranteed by the taxpayer who pledged as collateral certain listed common stocks and life insurance policies owned by him. (R. 29.)

The taxpayer and his wife claimed a deduction in the amount of \$83,316.29 on their joint income tax return for 1950 as "Bad debts arising from sales or services." This deduction was explained in Schedule C-2 of their 1950 return as "Payments made to U. S. National Bank as guarantor of business debt." The foregoing deduction represented payments made by the taxpayer in January and March of 1950 as guarantor on the notes of Screen Adette Equipment Corporation. (R. 29-30.)

The Tax Court found as a fact that the indebtedness in question did not bear a proximate relationship to the taxpayer's trade or business, either at the time the loan was made or at the time it became worthless, and that, therefore, the losses in issue must be treated as nonbusiness bad debts under Section 23(k) (4) of the 1939 Code. (R. 34.)

SUMMARY OF ARGUMENT

Section 23(k) of the Internal Revenue Code of 1939 authorizes the deduction in full of business bad debt losses, but provides for only limited deductibility of nonbusiness bad debts. The statute defines a non-business bad debt as a debt other than one the loss from the worthlessness of which is incurred in a taxpayer's trade or business. Whether the loss is incurred in the taxpayer's business presents a question of fact for the trial court, whose determination may not be disturbed unless clearly erroneous.

The indebtedness in question was one on a guaranty executed by the taxpayer in order to accommodate a corporation of which he was controlling stockholder, officer and employee. The guaranty was given to help the corporation in its business. It is uniformly held that in this type of case it is only where the taxpayer-stockholder is individually engaged in the business of promoting, financing and managing business enterprises, that he can deduct losses resulting from loans made to his corporation (directly or as guarantor) as business bad debts.

The taxpayer did not claim in the trial court, nor does he claim in this Court, that he was in the business of guaranteeing loans, and the promotional or organizational activity in which he engaged falls far short of amounting to the carrying on of the business of promoting, financing and managing business enterprises. Although the taxpayer in several instances made use of the corporate form of doing business, it is settled law that the business of a corporation is not the business of its stockholders, officers or em-

ployees. Though the loss was proximate to the business of a corporation controlled by the taxpayer, the taxpayer may not treat the corporation's business as his own for purposes of claiming a business bad debt deduction.

The Tax Court was, therefore, clearly justified in finding that the indebtedness in question was not incurred in the prosecution of an individual business of the taxpayer, either at the time it was incurred or at the time it became worthless, and that the taxpayer is entitled only to a nonbusiness bad debt loss deduction. The taxpayer points to no authority which calls for reversal of the decision below.

ARGUMENT

**The Tax Court Applied the Correct Principles of Law,
and Its Finding That the Claimed Bad Debt Losses
Were Not Incurred In the Individual Trade or Busi-
ness of the Taxpayer Is Supported By the Evidence
and Not Clearly Erroneous**

A. Issue presented and controlling principles

1. Issue presented

Section 23(k)(1) of the Internal Revenue Code of 1939, *supra*, authorizes the deduction in full of that part of a debt which becomes worthless during the taxable year, but excepts therefrom nonbusiness debts of noncorporate taxpayers; and Section 23(k)(4) allows a deduction for a nonbusiness debt when the debt becomes worthless in the taxable year, limiting the deduction to a short-term capital loss deduction. Section 117(d)(2) of the 1939 Code, as amended by Section 150(c) of the Revenue Act of

1942, c. 619, 56 Stat. 798 (26 U.S.C. 1952 ed., Sec. 117), provides that in the case of a taxpayer, other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the net income of the taxpayer or \$1,000, whichever is smaller.

In this case the taxpayer contends that he is entitled to a business bad debt loss deduction under Section 23(k)(1) of the 1939 Code. The loss was due to a guaranty executed by the taxpayer on behalf of his wholly-owned corporation; however, since the Supreme Court classifies such transactions for the purpose of Section 23(k) as loans, in this brief we sometimes refer to the transaction here in question as a loan. *Putnam v. Commissioner*, 352 U. S. 82.

In determining whether a debt is business or non-business, the inquiry is whether the loss was incurred in the conduct of a trade or business in which the taxpayer was individually engaged at the time the debt became worthless. *Skarda v. Commissioner* (C.A. 10th), decided November 30, 1957 (58-1 U.S.T.C., par. 9142); *Pokress v. Commissioner*, 234 F. 2d 146 (C.A. 5th); *Hickerson v. Commissioner*, decided December 29, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,343), affirmed, 229 F. 2d 631 (C.A. 2d); *Van Pelt v. Commissioner*, decided August 10, 1950 (1950 P-H T. C. Memorandum Decisions, par. 50,193), affirmed *per curiam*, 191 F. 2d 861 (C.A. 6th); Section 29.23(k)-6, Treasury Regulations 111, *supra*. The question is one of pure fact

for the trial court and, therefore, the inquiry on appeal is whether that court's finding is clearly erroneous. *Maloney v. Spencer*, 172 F. 2d 638, 640 (C.A. 9th); *Gulledge v. Commissioner*, 249 F. 2d 225, 227 (C.A. 4th); *Wheeler v. Commissioner*, 241 F. 2d 883 (C.A. 2d); *Giblin v. Commissioner*, 227 F. 2d 692 (C.A. 5th); *Nicholson v. Commissioner*, 218 F. 2d 240 (C.A. 10th); *Skarda v. Commissioner*, *supra*; *Pokress v. Commissioner*, *supra*, p. 150; *Sogg v. Commissioner*, decided October 4, 1950 (1950 P-H T. C. Memorandum Decisions, par. 50,251), affirmed *per curiam*, 194 F. 2d 540 (C.A. 6th); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 90 (1942-2 Cum. Bull. 504, 573).

The Tax Court in this case found (R. 34) that the indebtedness in question was not incurred in the prosecution of an individual business of the taxpayer, either at the time the loan was made or at the time it became worthless, and, accordingly, allowed only a nonbusiness bad debt deduction for the losses in question. If that court applied the correct principles of law, the only issue is a factual one—whether the present record is such that the Tax Court was compelled, as a matter of law, to find for the taxpayer.

2. *The controlling principles*

The principle is well settled, and is of general application in tax controversies, that corporations are entities separate and apart from their owners, having their own business, and their owners may not treat that business as their own in order to realize tax benefits. *Burnet v. Commonwealth Imp. Co.*, 287

U. S. 415, 419; *Burnet v. Clark*, 287 U. S. 410, 415; *Dalton v. Bowers*, 287 U. S. 404, 410; *Brinker v. United States*, 116 F. Supp. 294, 298 (N.D. Cal.), affirmed *per curiam*, 221 F. 2d 478 (C.A. 9th); *Commissioner v. Schaefer*, 240 F. 2d 381, 383 (C.A. 2d). When, therefore, a corporation sustains losses, or when, as in this case, its stockholder guarantees its debts or advances funds to it and a loss is incurred, that loss is directly related to, and a result of, the corporation's trade or business (*Wheeler v. Commissioner*, decided May 27, 1955 (1955 P-H T. C. Memorandum Decisions, par. 55,138), affirmed, 241 F. 2d 883 (C.A. 2d); *Commissioner v. Schaefer*, *supra*, p. 383; *Van Dyke v. Commissioner*, 23 B.T.A. 946, affirmed *per curiam*, 63 F. 2d 1020 (C.A. 9th), affirmed *per curiam*, 291 U. S. 642, rehearing denied, 291 U. S. 650), and it is the corporation which, under the taxing statute, is entitled to deduct the funds thus lost as business-loss deductions. *Gulledge v. Commissioner*, 249 F. 2d 225 (C.A. 4th).

Since, in order to take a business bad debt deduction a taxpayer must have sustained the loss in a trade or business of his own, and since the business of a corporation is not that of its stockholders, the general rule is that when a taxpayer chooses the corporate method for ownership and conduct of his business he may not, when it comes to determining his tax obligations, treat the promotion and financing of the business as his personal business. This is so whether he carries on such activity through one corporation or several corporations. *Burnet v. Clark*, *supra*; *Dalton v. Bowers*, *supra*; *Van Dyke v. Com-*

missioner, supra; *Towers v. Commissioner*, 24 T. C. 199, affirmed, 247 F. 2d 233 (C.A. 2d), certiorari denied, January 6, 1958; *Commissioner v. Schaefer, supra*; *Hickerson v. Commissioner*, decided December 29, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,343), affirmed, 229 F. 2d 631 (C.A. 2d); *Nicholson v. Commissioner*, 218 F. 2d 240 (C.A. 10th); *Berwind v. Commissioner*, 20 T. C. 808, affirmed *per curiam*, 211 F. 2d 575 (C.A. 3d); *Commissioner v. Smith*, 203 F. 2d 310 (C.A. 2d), certiorari denied, 346 U. S. 816. And, if such taxpayer devotes a substantial length of time as an officer and manager of his corporations, as is the usual case, it may be that he is personally in a business of sorts; but loans to a corporation by an officer or manager thereof are no part of the business of being an employee. *Commissioner v. Schaefer, supra*; *Hickerson v. Commissioner, supra*; *Nicholson v. Commissioner, supra*; *Berwind v. Commissioner, supra*; *Commissioner v. Smith, supra*; *Van Pelt v. Commissioner*, decided August 10, 1950 (1950 P-H T. C. Memorandum Decisions, par. 50,193), affirmed *per curiam*, 191 F. 2d 861 (C.A. 6th); *Park v. Commissioner*, 22 B.T.A. 1263, affirmed *sub nom. In re Park's Estate*, 58 F. 2d 965 (C.A. 2d), certiorari denied, 287 U. S. 645; *Boissevain v. Commissioner*, 17 T. C. 325.

To take a transaction out of the general rule the taxpayer has the burden of showing that the corporation to which the loan in issue was made was merely a part of a complete, comprehensive business of promoting, organizing and managing business enterprises (a rule applied by decisions commonly re-

ferred to as the “promoter” cases) in the year in which the loss was incurred, and that the loss was sustained in the carrying on of that business.² *Brinker v. United States*, 116 F. Supp. 294 (N.D.Cal.), affirmed *per curiam*, 221 F. 2d 478 (C.A. 9th); *Skarda v. Commissioner* (C.A. 10th), decided November 30, 1957 (58-1. U.S.T.C., par. 9142); *Wheeler v. Commissioner*, decided May 27, 1955 (1955 P-H T. C. Memorandum Decisions, par. 55,138), affirmed, 241 F. 2d 883 (C.A. 2d); *Giblin v. Commissioner*, 227 F. 2d 692 (C.A. 5th); *Boissevain v. Commissioner*, *supra*; *Campbell v. Commissioner*, 11 T. C. 510.

Applying the principles just discussed, the Tax Court in this case found (R. 33) that the taxpayer’s activities in connection with three corporations disclosed no more than the customary activities of an individual who devotes himself to carrying on a business enterprise by means of wholly-owned corporations—that the taxpayer was not in a separate business of promoting, organizing, financing and managing business enterprises before or during 1950, the year of the loss.

The taxpayer contends (Br. 7-11), however, that Congress intended that any taxpayer who carries on business through corporations is entitled to business

² Of course, if the taxpayer claims and proves that he was regularly and continuously engaged in the business of loaning money or, if a guaranty is in question, in the business of a guarantor, he may also show the loss was incurred in such a business. There was no contention below, nor is there in this Court, that the taxpayer was in any one of those businesses, and the record would not support such a contention.

bad debt deductions for advances to the corporations that subsequently become worthless. By giving undue emphasis to an incidental observation found in a House Ways and Means Committee Report (Br. 8), the taxpayer states that the law discussed, *supra*, is error for, if loans are not made to a friend or relative without expectation of repayment,³ it necessarily follows that they should be treated as business bad debts. This argument is without merit. Aside from the fact that this contention is contrary to all the cases cited, *supra*, the Supreme Court specifically over-ruled such contention in *Putnam v. Commissioner*, 352 U. S. 82, 91, fn. 17. Moreover, the Committee Reports of Congress specifically provide that a business bad debt deduction is allowable only where the loss is incurred in an individual trade or business in which the taxpayer is engaged at the time of the loss. H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 76-77 (1942-2 Cum. Bull. 372, 431); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 90 (1942-2 Cum. Bull. 504, 573).

B. The record furnishes clear support for the Tax Court's findings, which are not clearly erroneous

The taxpayer, in his second point, argues (Br. 6-7, 12-22) that if the Tax Court applied the correct

³ It may be well to point out that if money is loaned without expectation of repayment no bad debt deduction can be taken—business or nonbusiness. *Hoyt v. Commissioner*, 145 F. 2d 634 (C.A.2d); *W. F. Young, Inc. v. Commissioner*, 120 F. 2d 159 (C.A.1st); *Thompson v. Commissioner*, 22 T. C. 507.

principles, he was, in any event, a “promoter”, although he readily concedes that the record shows merely that he was carrying on business through several wholly-owned corporations (Br. 10-11, 19). His argument runs squarely counter to the settled general rule that if a taxpayer chooses to carry on business by means of controlled corporations, the business of the corporations is not his business, and loans made to those corporations, which subsequently become worthless, are not business bad debts.⁴ Such taxpayer, in contemplation of tax law, loans or advances money as a stockholder, officer, and investor interested in advancing the business of his corporation.⁵ *Burnet v. Clark*, 287 U. S. 410; *Dalton v. Bowers*, 287 U. S. 404; *Towers v. Commissioner*, 24 T. C. 199, affirmed, 247 F. 2d 233 (C.A. 2d), certiorari denied, January 6, 1958; *Wheeler v. Commissioner*, *supra*. Hence, as the taxpayer recognizes (Br. 19), the cases that allow business bad debt loss deductions under the “promoter” principle require a clear showing, as their mainstay, of continuous promotional activity in organizing many corporations, and the activity must be prosecuted with such regularity as to amount to the carrying on of a business. *Giblin v. Commis-*

⁴ This principle is referred to, for the sake of simplicity, as “the general rule”.

⁵ The taxpayer’s incidental suggestion (Br. 21-22) that during 1930 to 1950 he was in the trade of leasing and selling picture equipment is without merit—this business was that of Screen Addette Equipment Corporation, a separate and distinct entity from the individual who controlled it.

sioner, 227 F. 2d 692 (C.A. 5th); *Washburn v. Commissioner*, 51 F. 2d 949 (C.A. 8th); *Campbell v. Commissioner*, 11 T. C. 510. Cf. *Towers v. Commissioner*, *supra*; *Hickerson v. Commissioner*, 229 F. 2d 631, 634 (C.A. 2d); *Fuller v. Commissioner*, 21 T. C. 407, 412; *Reilly v. Commissioner*, decided January 20, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,007); *Cochran v. Commissioner*, decided March 21, 1955 (1955 P-H T. C. Memorandum Decisions, par. 55,066); *Boissevain v. Commissioner*, 17 T. C. 325, 333.

The cases upon which the taxpayer relies are readily distinguishable on their facts. If any comparison is to be made with other cases, then we submit that the instant case bears a closer resemblance to the many in which the trial courts' disallowance of the claimed deduction has been sustained on appeal than to the isolated few mentioned by the taxpayer.

In *Giblin v. Commissioner*, 227 F. 2d 692 (C.A. 5th), the taxpayer promoted or organized twelve business enterprises. In *Washburn v. Commissioner*, *supra*, the taxpayer promoted or organized eleven corporations. In *Campbell v. Commissioner*, *supra*, the taxpayer promoted or organized twelve corporations. In each of those cases the promoting activities were continuous and regular and the taxpayer spent his time managing and financing the various business enterprises. In each case it was determined that the corporations to which loans were made were a part of a separate business of the taxpayer—the business of promoting, financing and managing—and

business bad debt loss deductions were allowed.⁶

On the other hand, we have the following cases which apply the general rule and which would deny the taxpayer's contentions here on facts generally more favorable to him than the facts at bar:

In *Dalton v. Bowers*, 287 U. S. 404, the taxpayer had for twenty years busied himself with physical research and invention. In a space of five years following 1912 he organized six separate corporations and transferred to each patents for exploitation. The

⁶ The *Giblin* case (Pet. Br. 15-16) was distinguished by the very court which decided it, in *Pokress v. Commissioner*, 234 F. 2d 146, 150 (C.A.5th). Other cases cited by the taxpayer (Br. 12, 16) are inapposite. *Spencer v. Maloney*, 73 F. Supp. 657 (Ore.), affirmed, 172 F. 2d 638 (C.A.9th), and *Estate of Stokes v. Commissioner*, decided November 21, 1951 (1951 P-H T.C. Memorandum Decisions, par. 51,343), affirmed, 200 F. 2d 637 (C.A.3d), were not decided on the "promoter" principle. In *Spencer v. Maloney* the trial court found as a fact that money loaned by the taxpayer to two corporations and subsequently lost was lost in the taxpayer's business of leasing plants which he carried on as a sole proprietor. This Court found that finding not clearly erroneous, ruling that the loans were made under a contract which required the taxpayer, as part of his services as landlord, to adequately finance the needs of the lessee-corporations. In the *Stokes* case the Third Circuit agreed with the general principle heretofore discussed; however, it affirmed the Tax Court's finding that the taxpayer was individually engaged in the business of locating promising patents, financing developments, acquiring title to machinery and plants, and securing rights to foreign patents—all substantially prosecuted on the taxpayer's own account. In addition, the taxpayer interested himself in six corporations which helped him exploit his patents. The losses sustained due to loans made to one of those corporations were held incurred in the taxpayer's individual business of exploiting patents.

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taxpayer was sole owner and operated and financed these corporations. The Supreme Court refused to allow a business deduction for the loss which the taxpayer incurred on his stock, holding that the facts were not so unusual as to except the taxpayer from the general rule.

In *Burnet v. Clark*, 287 U. S. 410, the taxpayer was controlling stockholder and active head of Bowers Southern Dredging Company, a corporation; he also was a member of three partnerships in the same business as the corporation, and he owned stock in a number of corporations. The Court declined to consider guaranties made by the taxpayer for Bowers Southern Dredging Company as part of an individual business of his—holding the facts not so unusual as to except the taxpayer from the general rule.

In *Van Dyke v. Commissioner*, 23 B.T.A. 946, affirmed *per curiam*, 63 F. 2d 1020 (C.A.9th), affirmed *per curiam*, 291 U. S. 642, rehearing denied, 291 U. S. 650, the taxpayer was interested in six corporations and promoted and operated at least four of them. He loaned money to these enterprises and sought a business deduction for a loss on loans made to one of the corporations. The taxpayer in that case made the same argument before this Court as the taxpayer here makes—that he was a “promoter”, promoting, financing and operating many business enterprises. (See the taxpayer’s brief (pp. 7-9, 11-15) in *Van Dyke v. Commissioner*, No. 6949 (C.A.9th), in which the petition for review was filed in this Court on March 17, 1932.) This Court affirmed the finding of the Board of Tax Appeals, holding that

the loss was not a business loss, on the authority of *Burnet v. Clark*, *supra*, and *Dalton v. Bowers*, *supra*, and the Supreme Court affirmed.

In *Towers v. Commissioner*, 24 T. C. 199, affirmed, 247 F. 2d 233 (C.A.2d), certiorari denied, January 6, 1958, the taxpayers, during the period 1936 through 1947, organized four corporations and one partnership. They devoted the major portion of their business activities to operating two of the corporations and derived substantially all their income therefrom. On a number of occasion they loaned money to their corporations and in 1947 when the corporations were adjudged bankrupt the taxpayers incurred losses on their loans. The Tax Court's finding (p. 210), that the promotional business ventures were not continuous and unbroken during the entire period 1936 to 1947 and did not, therefore, constitute part of a single overall business, was affirmed by the Second Circuit.

In *Brinker v. United States*, 116 F. Supp. 294 (N.D.Cal.), affirmed *per curiam*, 221 F. 2d 478 (C.A.9th), *Wheeler v. Commissioner*, decided May 27, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,138), affirmed, 241 F.2d 883 (C.A.2d), and *Hickerson v. Commissioner*, decided December 29, 1954 (1954 P-H T.C. Memorandum Decisions, par. 54,343), affirmed, 229 F. 2d 631 (C.A.2d), this Court and the Second Circuit affirmed trial court findings denying taxpayers business bad debt deductions on facts disclosing more promotional activities than found in the present record. And, see *Schaefer v. Commissioner*, 24 T.C. 638, reversed, 240 F. 2d 381 (C.A.2d), where the Tax Court's allowance of a

business had debt loss deduction to a taxpayer who carried on a movie production and distribution business as officer of four corporations, and who organized and operated two corporations in that field, was reversed by the Court of Appeals.

In considering the taxpayer's arguments, the Tax Court's findings should be examined in the light of the now familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly establishing the right to the claimed deduction is upon the taxpayer. *Interstate Transit Lines v. Commissioner*, 319 U. S. 590. With this in mind, we submit, it is quite clear that the present case falls within the rule of *Dalton v. Bowers* 287 U. S. 404; *Burnet v. Clark*, 287 U. S. 410; *Van Dyke v. Commissioner*, 23 B.T.A. 946, affirmed *per curiam*, 63 F. 2d 1020 (C.A.9th), affirmed *per curiam*, 291 U.S. 642, rehearing denied, 291 U. S. 650; *Towers v. Commissioner*, 24 T. C. 199, affirmed, 247 F. 2d 233 (C.A.2d), certiorari denied, January 6, 1958; *Brinker v. United States*, 116 F. Supp. 294 (N.D.Cal.), affirmed *per curiam*, 221 F. 2d 478 (C.A.9th); *Wheeler v. Commissioner*, decided May 27, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,138), affirmed, 241 F. 2d 883 (C.A.2d); *Hickerson v. Commissioner*, decided December 29, 1954 (1954 P-H T.C. Memorandum Decisions, par. 54,343), affirmed, 229 F. 2d 631 (C.A. 2d); and *Schaefer v. Commissioner*, 24 T. C. 638, reversed, 240 F.2d 381 (C.A.2d); and is clearly not within the ambit of the "promoter" line of cases.

The evidence in the present case discloses that the taxpayer in 1930 organized Pictures, Inc., which re-

mained inactive until 1949. In 1932 he organized Screen Adettes, Inc., the business of which was the sale and distribution of films. The taxpayer was an officer and employee of that corporation, and on several occasions personally guaranteed loans made to it by a bank. (R. 21, 27.) In the subsequent thirteen years the taxpayer's activities were substantially confined to one corporation (Screen Adettes, Inc.), and he engaged in no promotional or organizational activities whatever. (R. 27.) In 1945 he organized Screen Adette Equipment Corporation for the purpose of engaging in the sale and distribution of motion picture equipment and accessories, and he subsequently (in the year 1946) executed a guaranty so that the corporation could obtain loans from a bank, which money was needed in its business. The taxpayer was an officer and employee of that corporation. (R. 27-28, Ex. 8-H.) In the subsequent five years the taxpayer neither organized nor promoted any corporations. (R. 27-29.) He owned controlling shares in Helene's, Inc., a corporation engaged in the ladies' clothing store business, but he did not organize that corporation; he was an officer and employee and guaranteed, prior to 1949, loans made by a bank to that corporation. Helene's, Inc., ceased business in 1949. (R. 29.) In 1949 Screen Adette Equipment Corporation went into bankruptcy and was dissolved in 1950 (R.28), the year in which the taxpayer incurred the losses on his guaranty for that corporation and for which he claims business bad debt loss deductions (R. 29-30).

It is too clear to admit of dispute that the tax-

payer's promotional activities during the period 1930 to 1950 were *not* continuous, unbroken, regular, or numerous; indeed, they were less than those found in the majority of the cases cited in which stockholders were held not to be engaged in a separate business from that of their corporations. The present record, we submit, forecloses any contention that the promotional activities in this case were so unusual as to have become an occupation in their own right. As the Tax Court found (R. 33), the record merely discloses the customary activities of an individual who devotes himself to carrying on business through several corporations. As such, the taxpayer may not, after having chosen the corporate method for ownership and conduct of business, have the production and financing of the corporate business treated as his individual business.⁷ *Dalton v. Bowers, supra; Burnet v. Clark, supra; Van Dyke v. Commissioner, supra; Towers v. Commissioner, supra; Commissioner v. Schaefer*, 240 F.2d 381 (C.A.2d); *Hickerson v. Commissioner, supra; Berwind v. Commissioner*, 20 T.C. 808, affirmed *per curiam*, 211 F. 2d 575 (C.A.3d);

⁷ Moreover, it is likewise clear that the taxpayer did not consider, nor does the evidence indicate, that his guaranty of loans was to further any independent promoting business that he contends he carried on; the evidence shows (R. 19), as the Tax Court also found (R. 33), that the guaranty was executed to assist the corporation in *its* business of selling motion picture equipment. For this separate and additional reason, the taxpayer must be denied a business bad debt loss deduction. *Brinker v. United States*, 116 F.Supp. 294, 298 (N.D.Cal.), affirmed *per curiam*, 221 F. 2d 478 (C.A. 9th); *Wheeler v. Commissioner*, 241 F. 2d 883, 884 (C.A.2d).

Commissioner v. Smith, 203 F. 2d 310 (C.A.2d), certiorari denied, 346 U. S. 816.

What is even clearer is that the taxpayer was not *carrying on* a "promoter" business in 1950, the year of the loss. See Section 29.23(k)-6 of Treasury Regulations 111, *supra*. In that year he did not carry on any promotional activities, and had not done so since 1945 when he organized one corporation. For the first time, for part of the year 1950, the taxpayer was personally in the business of selling film equipment (as a sole proprietor) (R. 29); there could be no contention, and there is none, that the loss in question was incurred in that business. The taxpayer's other activity in 1950 was as an employee and a stockholder of two corporations which he had organized eighteen and twenty years prior to 1950, and as a salesman for a firm in which he had no proprietary interest. (R. 27, 29.) These activities, as the Tax Court found (R. 34), clearly did not put the taxpayer in the required business of promoting, financing and managing business enterprises. *Fuller v. Commissioner*, 21 T.C. 407, 412; *Reilly v. Commissioner*, decided January 20, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,007); *Cochran v. Commissioner*, decided March 21, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,066).

In short, the record fully supports the Tax Court's findings; it certainly does not compel a matter-of-law conclusion the other way so as to justify assailing that court's findings as clearly erroneous.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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FEBRUARY, 1958.

United States
COURT OF APPEALS
for the Ninth Circuit

MERRIMAN H. HOLTZ and HELENE TYROLL
HOLTZ,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petitioners' Reply Brief

*Petition to Review a Decision of the Tax Court
of the United States*

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No. 15755

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Petitioners' Reply Brief

*Petition to Review a Decision of the Tax Court
of the United States*

Petitioners submit, in reply to some of the contentions advanced in respondent's brief, the following:

(a) It is asserted in respondent's brief (pp. 11, 12) that the question of whether the bad debt losses under consideration herein were business or non-business bad debt losses is one of "pure fact for the trial court . . ." and that, accordingly, the only issue on appeal is whether the Tax Court's finding is clearly erroneous. A similar contention was made by the Commissioner of Internal Revenue in *Washburn v. Commissioner of Internal Rev-*

enue 51 F.2d 949 (8 Cir). At issue in the Washburn case was the question of whether or not taxpayer had suffered a net loss within the meaning of Section 204 of the Revenue Act of 1921 which provided for the carryover of net losses "resulting from the operation of any trade or business regularly carried on by the taxpayer" In answer to the respondent's contention the Court stated, at p. 951: "That there may be some degree of finality in a finding of fact by an administrative body may be conceded, but such finding cannot take from the courts the power to construe a statute and determine whether it covers such a situation as the facts present. *Great Northern Ry. Co. v. Merchant's Elevator Co.*, 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943. In our judgment there is nothing in the point urged by the respondent that we are concluded by the decision of the Board (of Tax Appeals, now the Tax Court of the United States) because of its finding as an ultimate fact that petitioner was not engaged in a trade or business regularly carried on."

The primary facts involved in the case at bar have been stipulated by the parties hereto. Any determination by the Tax Court can only be considered as a conclusion of law determined by applying the relevant statutes to the stipulated facts—the findings of the Tax Court are made in support of this legal conclusion and the question to be determined is whether the facts bring the bad debt loss of petitioner within the concepts of a business bad debt or a non-business bad debt as those concepts were intended by the Congress when it enacted Sections 23 (k)(1) and 23(k)(4) of the Internal Revenue Code of

1939. Manifestly, this is a question involving the construction of a statute, and, as such, is one for determination by this Court.

(b) Petitioners do not contend, as alleged in respondent's brief (pp. 15, 16) that "any taxpayer who carries on business through corporations" is entitled to a business bad debt deduction for advances to the corporations that subsequently become worthless. Petitioners' contention is that where an individual's trade or business is carried on through several controlled corporations, and the individual's business activities for a 20 year period consist almost entirely of the organizing, acquiring, managing and financing of such corporations, that a loss suffered in connection with such activity is of a business nature and is not a non-business loss.

(c) *Putnam v. Commissioner*, 352 U.S. 82, to which reference is made in respondent's brief at page 16, involved a bad debt loss suffered by an attorney, as guarantor of a corporate obligation, in a venture not connected with his law practice. The taxpayer's contention, before the Supreme Court of the United States, was that the loss suffered by him was incurred in a transaction entered into for profit, though not connected with his trade or business, and deductible as a loss pursuant to Section 23(e)(2), Internal Revenue Code of 1939.* The

"Section 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

* * * * *

"(e) LOSSES BY INDIVIDUALS.

"In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—* * *

"(2) if incurred in any transaction entered into for profit, though not connected with the trade or business * * * * *."

Court held that the loss suffered was a non-business bad debt, deductible under the provisions of Section 23(k) (4). The disparity between the facts in Putnam and those of the instant case are obvious: the taxpayer in Putnam was an attorney and the corporation whose loan he guaranteed had *no connection* with the taxpayer's law practice; petitioner Merriman H. Holtz's guaranties were made on behalf of corporations, the organizing, managing and financing of which constituted the petitioner's *primary* business activity for a period of twenty years.

(d) To describe the portion of the House Ways and Means Committee's Report quoted in petitioner's brief at p. 8 as "an incidental observation" (Resp. Br., p. 16) does not change what appears to be a clear expression of the legislative intent with respect to Section 23(k)(4). The Congressional Committee obviously was describing the purpose of its proposed legislation. It does not seem reasonable to assume, as does respondent, that the quoted portion of the Committee Report was not properly descriptive of the Committee's *primary objective* in proposing the legislation in question, but was, instead, merely an "incidental observation."

(e) Respondent seeks to distinguish the instant case from *Giblin v. Commissioner* 227 F.2d 692, *Washburn v. Commissioner* 51 F.2d 949 and *Campbell v. Commissioner* 11 TC 510, by pointing out that in each of the cited cases, all of which were decided favorably to the taxpayers, the taxpayers had promoted or organized eleven or twelve corporations (Resp. Br., p. 18). It is submitted once again that if a determination is to be made as to whether petitioner's activities fall within the

scope of the business of organizing, financing and managing business enterprises, the quantitative test which respondent applies cannot logically be limited to the *organization* of corporations and the number so organized but must likewise be applied to the financing and managing activities of the taxpayer. With respect to the quantity of financing transactions (Ex. 5E, 6F, 7G, 8H, 9I, 10J) and the extent of corporate managerial activity, it is submitted that the record clearly discloses that petitioner Merriman H. Holtz is entitled to even more favorable consideration than were the taxpayers in Giblin, Washburn or Campbell, *supra*.

Respectfully submitted,

MOE M. TONKON,
Attorney for Petitioners.

United States
COURT OF APPEALS
for the Ninth Circuit

MERRIMAN H. HOLTZ and HELENE TYROLL
HOLTZ,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S BRIEF

*Petition to Review a Decision of the Tax Court
of the United States*

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FILED

JAN 11 1938

PAUL E. JOHNSON, CLERK

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PETITIONER'S BRIEF

*Petition to Review a Decision of the Tax Court
of the United States*

STATEMENT OF JURISDICTION

The petition for review of the decision of the Tax Court of the United States in Docket No. 58 455 by the United States Court of Appeals for the Ninth Circuit was filed pursuant to 26 U.S.C. Sec. 7482 and 7483 (Tr. 34).

The petition for redetermination of the proposed deficiency was filed in the Tax Court of the United States pursuant to 26 U.S.C. Sec. 7442 (Tr. 5).

STATEMENT OF THE CASE

The petitioners are husband and wife, and have resided in Portland, Oregon, since 1930, except during the years 1943 to 1945 when petitioner, Merriman H. Holtz, temporarily resided in Washington, D. C., during which period he fulfilled duties under a special appointment in connection with the promotion and sale of War Bonds for the Treasury Department (Tr. 18).

This petition for review is primarily concerned with the business activities of petitioner, Merriman H. Holtz and hereinafter the designation "petitioner" has reference to him.

During the period 1930-1950 petitioner organized, financed and managed four corporations and a single proprietorship business; the principal activity of these enterprises was the distribution, sale and rental of motion picture equipment, accessories and film. Petitioner was actively engaged in the management and operation of all of these enterprises (Tr. 19, 21, 22, 23).

Petitioner's financing activities in connection with the corporations were consistent and numerous and in the form of personal guarantees to The United States National Bank of Portland, Oregon, on loans which that bank made to the several corporations. During the ten year period from 1941-50 inclusive, for example, petitioner guaranteed borrowings of the corporations in over 250 instances and in individual amounts ranging up to \$140,000.00 (Exs. 5E, 6F, 7G, 8H, 9I, 10J).

In October 1949, Screen Adette Equipment Corporation, one of the corporations which petitioner had organized, financed and operated filed a voluntary petition in bankruptcy in the United States District Court for the District of Oregon. In January and March, 1950, the United States National Bank of Portland, Oregon, sold collateral securities which had been personally pledged by petitioner, the market value of which when pledged, exceeded by a considerable amount the indebtedness of the corporation guaranteed by the petitioner. The Bank realized \$83,316.29 from the sale and applied that amount upon the debt of the corporation, leaving a balance still owing by petitioner of \$64,119.34 (Tr. 20).

The petitioners filed a joint income tax return for 1950 and claimed the payment made by them to the United States National Bank of Portland as a business bad debt deductible under the provisions of Section 23(k) (1) of the Internal Revenue Code of 1939. Their tax return for the year 1950 showed a net operating loss of \$76,656.23. By virtue of a carry-back of a portion of said net operating loss, petitioners claimed and obtained a refund of their 1949 income taxes in the amount of \$958.30 (Tr. 12, 13, 14, 15, 18, Exs. 1A, 2B).

Respondents asserts that the bad debt loss incurred in 1950 was a non-business bad debt, deductible under the provisions of Section 23(k) (4) of the Internal Revenue Code of 1939 (Tr. 18, 19). Section 23(k) (4) provides that a non-business bad debt is to be treated in the same manner as a short term capital loss, i.e., deductibility is limited to the amount of capital gains

during the period in question plus \$1000.00 which may be offset against ordinary income.

Accordingly, respondent contends that petitioners owe taxes for the year 1950 in the amount of \$671.66, after making allowance for the \$1000.00 capital loss deduction permitted under Section 23(k)(4), and that the refund obtained for 1949 in the amount of \$958.30 was improperly claimed and collected (Tr. 12, 13, 14, 15).

Petitioners contend that the loss incurred during 1950 was proximately related to the trade or business of petitioner Merriman H. Holtz, which was the sale, rental and distribution of motion picture equipment, supplies and film, and the organizing, financing and managing of business enterprises engaged in such sale, rental and distribution, and which business was conducted by him during and throughout the period 1930 to 1950 inclusive; and that accordingly petitioners correctly treated said loss as a fully deductible business bad debt under Section 23 (k)(1) (Tr. 6).

In the Tax Court all facts were stipulated by the parties hereto and respondent's contention was sustained (Tr. 26, 34).

SPECIFICATION OF ERRORS

Petitioner relies upon the specification of errors contained in a statement of points on appeal heretofore filed in the within cause, and generally that the findings of fact and conclusions of law made by the Tax Court are erroneous, as follows:

1. The Tax Court erred in holding that any deficiency exists with respect to petitioners' income tax liability for the calendar years 1949 and 1950.

2. The Tax Court erred in holding that the activities of petitioner Merriman H. Holtz during the period 1930-1950 inclusive, did not constitute the business of organizing, financing and managing businesses.

3. The Tax Court erred in holding that the activities of petitioner Merriman H. Holtz during the period 1930-1950 were not sufficiently extensive to establish the existence of the business of organizing, financing and managing businesses.

4. The Tax Court erred in holding that the indebtedness in question did not bear a proximate relationship to petitioner's trade or business either at the time the loan was made or at the time it became worthless.

5. The Tax Court erred in sustaining the Commissioner's disallowance of the business bad debt petitioners had deducted upon their 1950 income tax return under the provisions of Section 23(k)(1) of the Internal Revenue Code of 1939 in the sum of \$83,316.29, being payment made to the United States National Bank of Portland as guarantors on notes to one of the corporations which petitioners had organized, operated, financed and managed, and conversely the Tax Court erred in holding such payment by petitioners was a non-business bad debt deductible only as provided by Section 23(k)(4), Internal Revenue Code of 1939.

6. The Tax Court erred in that its opinion and decision are not supported by the facts and are contrary to law.

SUMMARY OF ARGUMENT

The Revenue Act of 1942 added Section 23(k)(4) to the Internal Revenue Act of 1939. This section limited the deductibility of non-business bad debts by treating such bad debt losses as short-term capital losses. The intent of the Congress, in adding this restriction, was primarily to restrict the deductibility of bad debts when the loans out of which they arose had been made to relatives or friends; there is no indication whatsoever of a legislative intent to treat as non-business debts loans of the type involved in the case under consideration.

The Tax Court, in construing Section 23(k)(4) with respect to the deductibility of bad debts, has determined that a taxpayer engaged in doing business through the medium of controlled corporations does not qualify for business bad debt treatment with respect to a loan made to one of his controlled corporations, unless his activities are of such nature that it can be said that he is in a separate business of organizing, financing and managing corporations. It is the contention of petitioner that this determination of the Tax Court goes far beyond the intent of Congress when it enacted Section 23(k)(4), and that a taxpayer engaged in business activity which he conducts through controlled corporations suffers a business bad debt loss when a loan made to one of his corporations, with full expectation of repayment, subsequently becomes worthless.

In the alternative petitioner contends that his activities were sufficiently extensive in the business of organ-

izing, financing and managing corporations, and that, accordingly, the bad debt loss suffered by him during the year 1950 should be treated as a business bad debt and not as a non-business bad debt.

The question to be determined here basically is one of statutory interpretation, namely, whether or not the activities of petitioner Merriman H. Holtz, during the period 1930-1950 inclusive, were business or non-business activities, within the intendment of Congress, when it added Section 23(k)(4) to the Internal Revenue Code of 1939.

ARGUMENT

I

CONGRESS, IN ENACTING SECTION 23(k)(4) OF THE INTERNAL REVENUE CODE OF 1939, DID NOT CONTEMPLATE THE CLASSIFICATION OF A LOSS OF THE TYPE UNDER CONSIDERATION HEREIN AS A NON-BUSINESS BAD DEBT.

Prior to the effective date of the Revenue Act of 1942, there was no distinction in the tax treatment of bad debts, whether business or non-business. All bad debt losses were fully deductible from ordinary income under Section 23(k)(1) of the Internal Revenue Code of 1939. Section 124(a) and 124(d) of the Revenue Act of 1942 amended Section 23(k)(1), making it applicable only to business bad debts, and added Section 23(k)(4) which provided that losses from non-business bad debts were to be treated as short term capital losses with limited deductibility against ordinary income. No adequate defi-

nition of "business" or of "non-business" was provided in the Act.¹

The primary rule to be applied in the construction of statutes is to ascertain and declare the intention of the legislative body. *U. S. v. Cooper Corp.*, 312 U.S. 600, 61 S. Ct. 742, 85 L. Ed. 1071, *U. S. v. N. E. Rosenblum Truck Lines*, 315 U.S. 50, 62 S. Ct. 445, 86 L. Ed. 671.

The House Ways and Means Committee Report, discussing the situation which was intended to be rectified by the addition of Section 23(k)(4) to the Revenue Act of 1939, contains the following language (emphasis supplied):

"The present law gives the same tax treatment to bad debts incurred in non business transactions as it allows to business bad debts. *An example of a non business bad debt would be an unrepaid loan to a friend or relative, while business bad debts arise in the course of the taxpayer's trade or business.* This liberal allowance for non business bad debts has suffered considerable abuse through taxpayers making loans which they do not expect to be repaid. *This practice is particularly prevalent in the case of loans to persons with respect to whom the taxpayer is not entitled to a credit for dependents*
* * * HR Rep. No. 2333, 77th Congress, 2d Sess. 45.

The legislative purpose would appear unmistakably to be concerned with abuse of the bad debt deduction through loans to friends or relatives where no business purpose was manifested or where there was no expectation of repayment, particularly where a "loan" was made

¹ Section 23(k)(1) and 23(k)(4) are set forth in the Appendix.

which in effect gave the taxpayer a dependency credit to which he was not otherwise entitled. It is submitted that only an extremely strained construction of the above quoted segment of the Committee Report could lead to the conclusion that it was intended by Congress to deny a business bad debt deduction to a taxpayer who suffers severe losses from a personal guarantee made on behalf of a controlled corporation, where the financing of the corporation, and of several other corporations controlled by the taxpayer, is part of a regular and extensive pattern carried on for many years, and particularly where the organization, financing and management of the corporations constituted the principal business activity of the taxpayer for a period of twenty years.

The Tax Court in *Cluett v. Commissioner*, 8 TC 1178, 1179 confirmed this interpretation of the legislative intent with respect to Section 23(k)(4):

“The legislative history of Section 23(k)(4) indicates that its principal purpose was to place a limitation upon losses from bad debts, such as loans to relatives or friends which had no connection with the business of the lender.”

Subsequent to the enactment of Section 23(k)(4), numerous cases have been considered by the Tax Court wherein the primary question to be decided was whether or not a taxpayer's activities were such that a loss suffered by him in connection with a loan to a controlled corporation could be deemed a business bad debt loss. The Tax Court, in considering this question, has determined in many cases that the taxpayer who suffers a bad debt loss on a loan to a corporation controlled by

him is not entitled to a business bad debt deduction, unless he is in a *separate* business of organizing, financing and managing corporations, or is engaged in the business of lending money.

D. J. Salomone, 27 TC 663;
W. M. Mayo, TC Memo 1957-9;
A. F. Lasker, TC Memo 1956-242;
Henry E. Sage, 15 TC 299.

Thus in its memorandum opinion in the case at bar, the Tax Court said that the activities of petitioner disclosed that he "devoted himself to carrying on a business enterprise by means of wholly-owned corporations," but the activities were held to be not sufficiently extensive to establish the existence of a "separate" business of promoting, organizing, financing and managing businesses during 1950 (Tr. 33, 34).

In effect, the Tax Court held that a taxpayer engaged in carrying on a business enterprise by means of wholly owned corporations, and who suffers a bad debt loss in connection with a loan to one of his corporations, has not incurred a business bad debt loss, but has instead incurred a non-business bad debt loss. In looking at the evil which Congress sought to cure by the enactment of Section 23(k)(4), as very clearly expressed in the House Ways and Means Committee Report, *supra*, it would seem to be obvious that there was no intent to exclude from the concept of "trade or business," the activities of a taxpayer engaged in carrying on a business enterprise through controlled corporations. To do so would in effect be to say that such a taxpayer has no trade whatsoever.

It is interesting to note that the respondent has never

made a contention that the businesses of the petitioner were undercapitalized or thin corporations, so that the loans made or guaranteed by petitioner might be deemed capital contributions.

It is and has been for many years, a common practice for individuals to form closely held corporations, and to carry on their trade or business activities by means of such corporations. Had it been the intent of Congress that Section 23(k)(4) was to have application to bad debt losses suffered on loans to closely held corporations, it is submitted that a reference to this very common situation would have been made by the Committee in its Report. Instead, the reference in the Committee Report to a non-business bad debt is "an unrepaid loan to a friend or relative." In addition the Committee indicated clearly that the abuse which it sought to cure was the practice of taxpayers in "making loans which they do not expect to be repaid." In the instant matter the facts clearly disclose that the petitioner did not make a loan which he did not expect to be repaid.

In order to bring the transaction involved herein within the clear intent of Congress, it is necessary to find an analogy between a "friend or relative," and a corporation controlled by the taxpayer. This obviously requires a distorted view of the Committee's intent in enacting the legislation in question. Even if this construction should be adopted, it is, nevertheless, apparent that the petitioner's loans or guarantees were not of the type under consideration by the Committee, for clearly there was always the expectation of repayment at the time the guarantees were made.

II

THIS COURT (IN MALONEY v. SPENCER, 172 F2d 638) AND OTHER COURTS HAVE HELD THAT A WORTHLESS DEBT LOSS INCURRED UNDER CIRCUMSTANCES ANALOGOUS TO THOSE PRESENT HEREIN SHOULD BE TREATED AS A BUSINESS BAD DEBT LOSS, FULLY DEDUCTIBLE UNDER THE PROVISIONS OF SECTION 23(k)(1) OF THE INTERNAL REVENUE CODE OF 1939.

Maloney v. Spencer (9th Cir.), (1949) 172 F. 2d 638, involved bad debt losses suffered by the taxpayer during the year 1945. In 1943, the taxpayer organized three corporations and became the sole stockholder in all three, except for qualifying shares. He was the owner individually of three food packing plants and he leased these plants, one to each corporation; he also entered into an agreement with his corporations to provide financing for them. Upon the failure of two of the corporations, the taxpayer was required to pay, as surety for corporate debts, amounts totalling \$95,081.48, which payments he treated as business bad debts. The Collector of Internal Revenue denied the business bad debt deduction, but the District Court, 7 Fed. Supp. 657, 658, found that taxpayer "was engaged in the business of acquiring, owning, expanding, equipping, and leasing food processing plants," and upheld the deduction as a business bad debt. This Court denied the Collector's contention, on appeal, that the District Court's finding was "clearly erroneous" and affirmed the judgment.

Had Spencer conveyed the properties to the corporations and accepted stock therefor, instead of leasing to the corporations, he would, under the Tax Court's

holding in the case at bar, have been denied a business bad debt deduction. It is submitted that a different tax effect should not result from the mere device of retaining in individual ownership business properties which are then leased to wholly owned corporations. Thus, if Holtz had sublet the business properties which were used by his corporations and, then being in the position of lessor, had suffered the actual losses which occurred, it would appear that an entirely different result would have obtained.

In *Maloney v. Spencer*, the situation basically was exactly the same as in the case at bar. In each case, the taxpayer devoted his business life to a single line of business which he conducted through the medium of wholly owned corporations. The sole difference between the two cases is that in the *Spencer* case, the taxpayer owned the properties which his corporations were using as their plants and that he, instead of conveying them to the corporations, retained the ownership thereof.

In *Spencer*, the taxpayer furnished the physical plants to his wholly owned corporations. In the case under consideration, petitioner Merriman H. Holtz furnished personal credit and personally owned securities to aid the operation of his corporations.

In the instant case, as in *Spencer*, the taxpayer's activities were extensive, varied, continuous and regular. His financing activities clearly cannot be said to be "isolated or occasional transactions" as was the case in *Burnet v. Clark*, 287 U.S. 410, and in *Dalton v. Bowers*, 287 U.S. 404, for the record is replete with evidence of

the extensive and continuing nature of his loans and guarantees. (Exs. 5E, 6F, 7G, 8H, 9I, 10J.) That his management activities were continuous and regular is also undisputed (Tr. 19, 21, 22, 23). In the *Spencer* case the taxpayer had organized, financed and operated three corporations, and in the instant case, the taxpayer organized or acquired, and financed and operated four corporations (Tr. 19, 21, 22, 23).

It is the contention of petitioner herein that the requirement that a taxpayer who makes loans to controlled corporations which he actively operates must be in a *separate* business of organizing, financing and operating corporations, in order to be permitted a business bad debt deduction for such loans which become worthless, is not in conformity with the clearly expressed Congressional intent. However, even should such a test be applied, it is submitted that petitioner's activities during and throughout the period in question were such that he clearly can be said to have been engaged in the business of organizing, financing and managing corporations, as that business has been defined by the courts.

During the years 1930-1950 inclusive, petitioner owned or organized and financed four separate corporations, and was actively engaged in the management of all of these enterprises (Tr. 19, 21, 22, 23). His financing activities were numerous and consistent; he guaranteed loans made to the corporations in amounts ranging up to \$140,000.00, and in over 250 different instances during the period 1941-1950 alone. (Exs. 5E, 6F, 7G, 8H, 9I, 10J).

In *Giblin v. Commissioner* (5th Cir.), 227 F.2d 692, the taxpayer was an attorney who, during the period from 1926 to 1945, while engaged in the practice of law, contributed time, energy and money to a number of business enterprises *entirely unconnected with his law practice*. On the strength of evidence which showed that about 50% of the taxpayer's time was devoted to the various enterprises in which he engaged, the Court of Appeals for the Fifth Circuit in reversing the Tax Court stated, at p. 698, that,

"To hold that a loss suffered from the becoming worthless of a loan made to one of these enterprises was not suffered in the course of his engaging in a trade or business, would be to apply a sterile and rigid approach that is not contemplated by the statute."

and at p. 696, that,

"both the Tax Court and Court of Appeals have recognized the type of activity engaged in by petitioner as satisfying the requirements of 'carrying on any trade or business,' when such activity has been sufficiently extensive to warrant the conclusion that the individual involved is more than a passive investor. *Foss v. Commissioner of Internal Revenue*, 1 Cir. 75 F2d 326; *Maloney v. Spencer*, 9 Cir. 172 F2d 638; *Commissioner of Internal Revenue v. Stokes' Estate*, 3 Cir. 200 F2d 637."

There can be no question but that the petitioner, Merriman H. Holtz, was far more than a "passive investor." His entire business life during the twenty year period involved in the matter at bar, was devoted to the furtherance of his business of organizing, financing, managing and operating corporations primarily engaged in selling, renting and distributing motion picture equip-

met, film and supplies. Can it be said that Giblin, who participated in eleven or twelve different enterprises over a twenty year period while primarily engaged in the practice of law was in a "business" other than his law practice, but that petitioner, Merriman H. Holtz, who devoted practically all of his time during a similar period of years to organizing, financing and managing his corporations was not engaged in a business? It is submitted that to do so would, as the United States Court of Appeals for the Fifth Circuit said in *Giblin*, require the application of a "sterile and rigid approach that is not contemplated by the statute."

In *Commissioner v. Stokes' Estate*, 200 F.2d 637, the decedent taxpayer had been engaged in locating, developing and exploiting patents by organizing, financing and actively participating in the management of corporations which had been organized to acquire such patents or operate under them, or by transferring such patents to existing companies in which he was a stockholder and active in management. The United States Court of Appeals for the Third Circuit held, at p. 638, that the

"* * * evidence established that (the taxpayer's) activities in locating, developing and exploiting patents involved much more than the mere investment of funds in and management of corporations. It was quite clearly a personal activity in which a major portion of the decedent's lifetime thought and energy was enlisted and in which he engaged continuously and regularly throughout his business career. In these respects this case—resembles *Maloney v. Spencer*, 9 Cir. 1949, 172 F2d 638, 640; *Vincent C. Campbell v. Commissioner*, 1948, 11 TC 510 acq. 1949-1 CB1. * * *"

The Court upheld the contention of the taxpayer's estate that a debt owed to Stokes by one of the companies which he had employed in connection with his activities was properly deductible as a business bad debt.

As in *Stokes*, taxpayer in the case at bar had been engaged primarily in a single field of endeavor and he conducted his activities in that field through corporations organized for that purpose. Here, too, it can be said that a major portion of taxpayer's lifetime, thought and energy have been enlisted in the pursuance of these activities.

In addition to the organizing, financing and management of his various business enterprises, the "personal activity" aspect is further emphasized by the prominent part played by petitioner, Merriman H. Holtz, in trade association activities, as one of the organizers of and as a director and officer in the National Association of Visual Education Dealers for a period of eleven years (Tr. 24).

In *Vincent C. Campbell et al v. Commissioner*, 11 TC 510, the taxpayers were engaged in the retail coal business. During the period 1929 through 1944, they organized, owned and operated twelve corporations engaged in selling coal at retail. Loans were made to these corporations and petitioners suffered a bad debt loss in connection with one of the companies. The Tax Court, in its opinion by Murdock, J., held that the bad debt loss was,

"directly a result of, and incurred in, the business of organizing and operating corporations engaged

in the retail coal business, which business of organizing and operating such corporations was carried on by the petitioners during the taxable year."

The Tax Court, in its opinion in the case at bar (Tr. 31, 32) apparently distinguishes the *Campbell* case from the instant case by a statement to the effect that in *Campbell* it was shown that from 1929 through 1944 the taxpayer had organized, managed and financed twelve corporations. The Tax Court, in its opinion below, cites the *Campbell* case as authority for the holding that, in order for for a worthless debt resulting from a loss by a stockholder to his corporation to qualify as a business bad debt the stockholder must be active in a "variety of businesses."

It is clear that in *Campbell*, the corporations were engaged in but a single business—that of selling coal at retail. The distinction which the Tax Court sought to draw between *Campbell* and the instant case was, therefore, meaningless, for petitioner herein was engaged in a considerably greater variety of businesses than were the taxpayers in *Campbell*; he was active during the period in question in organizing, financing and managing businesses engaged in the sale of motion picture equipment (Screen Adette Equipment Corporation) motion picture film and equipment. (Screen Adettes, Inc.) motion picture film (Pictures, Inc.) and ladies' apparel (Helene's, Inc.) (Tr. 19, 21, 22, 23.)

If the distinction between the instant case and *Campbell* is sought to be drawn on the basis of the *number* of corporations involved, it would appear that

such a distinction rests on an unsound foundation. Logically, there would appear to be required a consideration of the extent of the taxpayer's total activities which fall within the scope of the business of organizing, financing and managing business enterprises. Thus, if he had organized numerous corporations, had made but a single loan, and had not participated in management activities, it could not be said under the Tax Court's determination, that he was engaged in the business of "organizing, financing and managing" corporations. By the same token, if the taxpayer organizes but a single corporation, he could not logically claim to be in the business of "organizing, financing and managing" business enterprises, regardless of the extent of his financing and management activities with respect thereto. However, where the taxpayer, as in the instant case, has organized or acquired several corporations, and where his financing activities with respect thereto are consistent and numerous and where his entire business life for a period of twenty years is devoted to the management, financing and operation of the corporation, it is submitted that such a case falls within the rationale of *Campbell*, and within a reasonable contemplation of the intent of Congress with respect to what was to constitute "business" activity within the meaning of Section 23(k)(4).

Petitioner Merriman H. Holtz could easily have organized additional corporations, for he had offices in several states and could logically have done so, and under the reasoning of the Tax Court, if petitioner Holtz had carried on the same business activities through the

medium of additional corporate entities he would be engaged in a "business" as were the taxpayers in *Campbell*; having failed to do so, his activities are said to be of a non-business nature.

The total number of lending transactions involved in the *Campbell* case is not indicated; in the case at bar there were in excess of 250 loan transactions during the ten-year period 1941-1950 (Exhibits 5E, 6F, 7G, 8H, 9I, 10J).

In *Tony Martin v. Commissioner*, 25 TC 94, the taxpayer was a singer and entertainer who had suffered some adverse publicity while serving in the Armed Forces during World War II. Upon his honorable discharge from the service he was unable to obtain employment as a result of the aforesaid publicity. In order for him to achieve public acceptance again, Martin and his advisers decided that he had to make a good motion picture. Accordingly, Martin and others formed a corporation to produce the picture. The corporation was unable to borrow sufficient funds to complete the picture and Martin himself advanced money to the corporation for that purpose. The picture reestablished Martin but the corporation went into bankruptcy, and Martin suffered a bad debt loss. The Tax Court ruled that the bad debt loss incurred by Martin qualified as a business bad debt because it had the necessary proximate relation to Martin's business as an entertainer.

It is submitted that the taxpayer in the instant matter should be entitled to a business bad debt deduction within the meaning of Section 23(k)(1) more readily

than the taxpayer in the aforementioned Tax Court decision, for during twenty years he was engaged in the business of renting, selling and distributing motion picture film and equipment, and organizing, financing and operating corporations to carry out such business and certainly the bad debt loss suffered by him bore a proximate relation to his "trade or business."

CONCLUSION

The Tax Court has clearly erred in its determination and is relying on a narrow and unwarranted application of the Congressional intent in enacting Section 23(k) (4) of the Internal Revenue Code of 1939; as the Court of Appeals for the Fifth Circuit said in *Giblin v. Commissioner*, 227 F.2d 692, the Tax court has applied "a sterile and rigid approach that is not contemplated by the statute."

This court, in *Maloney v. Spencer*, 172 F.2d 638, sustained the taxpayer's contention that he was entitled to a business bad debt deduction under the provisions of Section 23(k)(1) of the Internal Revenue Code of 1939. The facts in the instant matter are strikingly similar to those in the *Spencer* case, and unmistakably meet the standards prescribed by the other cited decisions of the United States Courts of Appeal for engaging in a "trade or business." Petitioner should therefore be permitted to deduct as a business bad debt the loss sustained on account of the payment in 1950 of guarantees of bank loans to one of his several wholly owned cor-

porations engaged in carrying on his trade of leasing, selling and distributing motion picture film equipment and supplies.

Respectfully submitted,

MOE M. TONKON,
Attorney for Petitioner,

APPENDIX

INTERNAL REVENUE CODE, 1939

Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(k) Bad Debts.—

(1) General rule.—Debts which become worthless within the taxable year; or (in the discretion of the Commissioner) a reasonable addition to a reserve for bad debts; and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. This paragraph shall not apply in the case of a taxpayer, other than a bank, as defined in section 104, with respect to a debt evidenced by a security as defined in paragraph (3) of this subsection. *This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection . . .*

(4) Non-business debts.—In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. *The term "non-business debt" means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.*

(Pertinent portions of Act have been italicized.)

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Nos. ~~15765~~ and 15851 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15765³⁶

THEODULO NAVA REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15851

FEDERICO PEREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
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Nos. 15765 and 15851

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15765

THEODULO NAVA REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15851

FEDERICO PEREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Jurisdictional Statement.

These are appeals from judgments of conviction in the United States District Court for the Southern District of California, Southern Division. The jurisdiction of the District Court arose under Title 18, United States Code, Section 1407 (border crossings-narcotics addicts and violators). The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Sections 1291 and 1294.

Statement of the Case.

The appellee concurs in the statement made by appellants.

Summary of Argument.

I.

The convicted offender need not have been imprisoned for more than one year to be required to register.

II.

The classifications under the statute are fair and reasonable and therefore valid.

III.

Wilfulness is not a necessary ingredient of the statute nor of indictments based thereon.

IV.

The statute is valid under the self-incrimination clause of the Fifth Amendment of the Constitution and does not unreasonably restrict the right to travel.

ARGUMENT.

Appellee hereby refers to and incorporates the opinion of the Honorable James M. Carter in *United States v. Eramdjian*, 155 Fed. Supp. 914, and contends that it answers and disposes of each of Appellant' arguments.

I.

The Convicted Offender Need Not Have Been Imprisoned for More Than One Year to Be Required to Register.

United States v. Eramdjian, 155 Fed. Supp. 914, 931-932.

This answers and disposes of Appellants' argument I on pages 7-10 of their brief.

II.

The Classifications Under the Statute Are Fair and Reasonable and Therefore Valid.

United States v. Eramdjian, 155 Fed. Supp. 914, 929-931.

This answers and disposes of Appellants' argument II on pages 10-15 of their brief.

III.

Wilfulness Is Not a Necessary Ingredient of the Statute nor of Indictments Based Thereon.

United States v. Eramdjian, 155 Fed. Supp. 914, 924-925.

This answers and disposes of Appellants' argument III on pages 15-19 of their brief. *Lambert v. California*, 355 U. S. 225, decided after *United States v. Eramdjian*, *supra*, and cited by Appellants, is not controlling in this situation for the reasons hereinafter stated.

The Court of Appeals for the Ninth Circuit would have to overrule the Supreme Court decisions in *United States v. Balint*, 258 U. S. 250, and *United States v. Behrman*, 258 U. S. 280, before it could reverse the holding of *United States v. Eramdjian*, *supra*. There is an excellent discussion of these cases, including *Morissette v. United States*, 342 U. S. 246, in *United States v. Eramdjian*, *supra*, at pages 924 and 925. The Supreme Court did not intend to control the state of facts herein by its decision in *Lambert v. California*, 355 U. S. 225, decided after *United States v. Eramdjian*, *supra*, and cited in Appellants' brief at page 15.¹

The Supreme Court faces each new situation as it arises with a practical view toward whether it satisfies the guaranty of due process. In *Nebbia v. New York*, 291 U. S. 502 at p. 525, it is said that “* * * The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. * * * And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * *” There are wide differences between the facts in the *Lambert* decision and in the present case. One involves a municipal ordinance requiring felons in Los Angeles to register their names with the police. 18 U. S. C. 1407, is designed to hinder and prevent the international traffic in narcotics by requiring addicts or violators to register their trips into foreign

¹See Appendix I for actions taken by the Federal government to warn those required to register.

lands. It is stated at page 229 of the *Lambert* decision that "At worst the ordinance is but a law enforcement technique designed for the convenience of law enforcement agencies through which a list of the names and addresses of felons then residing in a given community is compiled." The test of a violation of that municipal ordinance is mere presence in the city for over five days. Under 18 U. S. C. 1407, a duty to register arises only if the citizen departs from or enters into the United States. The act of crossing and recrossing the international border is connected with the larger activity which it is the purpose of the statute to control; namely, the international traffic in narcotic drugs, and the spread of drug addiction. This federal statute falls within the demands of *Nebbia v. New York*, *supra* for it is a practicable way toward accomplishing the comprehensive aim of the Narcotic Control Act of 1956 of which it is an integral part. *United States v. Eramdjian*, *supra*, p. 918. In *Blackford v. United States*, 247 F. 2d 745, 752, the Court of Appeals for the Ninth Circuit takes judicial notice that the Mexican-California border is one of the major centers for importation of narcotic drugs into the United States. A reasonable way to substantially hinder and prevent the international traffic in narcotics is to require addicts and prior narcotic violators, who are thus in responsible relation to the danger, to register their travels between Mexico and the United States. When such a person registers his return from Mexico the custom officials are thereby alerted to watch for concealed narcotics or to detect that a registrant is then under the influence of narcotics.²

²See Appendix II for statistics showing operational statistics in connection with Section 1407.

Likewise, when an addict or violator fails to register, it is possible to take steps toward achieving the aim of the Narcotic Control Act by his arrest and conviction. Appellant Federico Perez was found to be addicted to Heroin at the time of sentencing; he was sentenced to be imprisoned for two years and it was recommended that he be sent to a United States Public Health Service hospital for the treatment and cure of the narcotics habit. The commitment of Federico Perez can be said to have a real and substantial relation toward preventing the spread of drug addiction. Appellant Teodulo Reyes as a narcotic violator was sentenced to imprisonment for one year and to pay a fine of \$100.00. The execution of the sentence was suspended as to imprisonment only and defendant was placed on probation for three years, one of the conditions being that he does not enter Mexico without first obtaining permission from the Probation Officer and that he not use nor associate with known users of narcotics in any form. The above conditions of probation can substantially help control the international traffic in narcotic drugs.

The registration requirement is a reasonable means toward accomplishing the object sought to be obtained in 18 U. S. C. 1407. The class of persons who must register under the federal statute is narrower and more closely related to a particular known danger than is the ordinance in *Lambert v. California*. The crossing of an international border is more singular than is entering or remaining in a given city and more likely to put one on notice that some search or registration is required. There is only one United States Code, whereas, there are ordinances of many municipalities. The large volume of vehicle, passenger and pedestrian traffic through the port

of San Ysidro, California should be a fact of which the court takes judicial notice. There is no practical step which can be taken which has not already been done to assure that every United States citizen who is an addict or a narcotic violator will have knowledge of his duty to register.

IV.

The Statute Is Valid Under the Self-Incrimination Clause of the Fifth Amendment of the Constitution and Does Not Unreasonably Restrict the Right to Travel.

United States v. Eramdjian, 155 Fed. Supp. 914, 925-929.

This answers and disposes of Appellants' argument IV at pages 19-26 of Appellants' brief.

Conclusion.

For the above stated reasons Appellee respectfully submits that the judgment should be affirmed.

Respectfully submitted,

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APPENDIX I.

Notice of Requirements of Section 1407.

18 U. S. C. 1407 was enacted on July 18, 1956. In November, 1956, the Director of the Bureau of Prisons directed that all inmates of federal and correctional institutions be furnished a copy of 18 U. S. C. 1407 and certify that he has read it before discharge. On January 7, 1957, four signs were posted at the port of entry, San Ysidro, California, warning narcotic users and violators that they were required to register before entering Mexico and upon returning to the United States. Custom Officials at the port of San Ysidro began to enforce the statute in February, 1957.

APPENDIX II.

Operational Statistics Re Section 1407.

During the six month period beginning September 1, 1957, and ending on February 28, 1958, 288 persons registered at the port of San Ysidro, California, as required by 18 U. S. C. 1407, a total of 1418 times.

Eleven addicts were arrested for failure to register of which seven were later convicted and the cases of four are pending. Each of the seven convicted addicts was sentenced to the custody of the Attorney General for periods ranging from eighteen months to two years with the recommendation that they be sent to U. S. Public Health Service Hospital for treatment and cure of the narcotic habit.

Thirty-nine narcotic violators were arrested of which fourteen were convicted and nine cases are pending, and the rest were dismissed. Two of the fourteen convicted violators were sentenced to the custody of the Attorney General and the other twelve were given probation.

During the same period at the San Ysidro port there were fifty-two seizures of marihuana involving about 200 pounds. Seventy-seven persons were arrested for smuggling marihuana of which twenty-one were addicts, five prior narcotic violators, two addicts who were also narcotic violators, and two narcotic violators who used marihuana. Eighteen of those arrested were users of marihuana.

There were sixteen seizures of Heroin totaling about twenty-nine ounces. Nineteen persons were arrested for smuggling Heroin of which eight were addicts who were also prior narcotic violators. Five were addicts and one a prior narcotic violator.

No. 15,767

IN THE

United States Court of Appeals
For the Ninth Circuit

ET MIN NG,

Appellant,

VS.

HERBERT BROWNELL, JR., Attorney Gen-
eral of the United States,

Appellee.

On Appeal from the United States District Court for the
District of Hawaii in Civil No. 1460.

BRIEF FOR APPELLEE.

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No. 15,767

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ET MIN NG,

Appellant,

VS.

HERBERT BROWNELL, JR., Attorney General
of the United States,

Appellee.

**On Appeal from the United States District Court for the
District of Hawaii in Civil No. 1460.**

BRIEF FOR APPELLEE.

**STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION.**

An Amended Complaint was filed by Appellant on February 20, 1956 (R. 2-5) and an Answer was filed on February 28, 1956 (R. 6-7). The jurisdiction of the District Court was based on 28 U.S.C. §2201, and §360(a), Immigration and Nationality Act. (8 U.S.C. §1503(a)). Judgment was entered on June 28, 1957 (R. 18) and a Notice of Appeal filed on July 23, 1957 (R. 19). Jurisdiction in this Court is predicated upon 28 U.S.C. §§1291 and 1294(1).

STATEMENT OF FACTS.

Since Appellant for the most part ignores the record with reckless abandon, Appellee will present his own statement of facts.

Appellant claims to be born in Toyshan City, China, on May 5, 1933 (R. 40-41, 97). He also claims he is the son of Hung Way Ng (R. 97, 98), and Hung Way Ng claims Appellant is his son (R. 40, 41). Hung Way Ng claims to be a citizen of the U. S. (R. 37) by acquisition through his father, Ng Yam Yat (R. 38), who he claimed was a U. S. citizen (R. 38, 39).

Appellant was admitted to the United States as a United States citizen by a Board of Special Inquiry on May 15, 1952 (R. 14).

In May 1953 Appellant applied for a Certificate of Citizenship at the Honolulu Immigration Office (R. 14).

The Appellee, through the Immigration and Naturalization Service, denied his application on the ground that he was not a National of the United States (R. 14).

In view of the wide disparity between the Court's findings (R. 13-16) and Appellant's statement of fact (Br. 1-4, 9) concerning the blood tests and blood test results, Appellee's statement concerning these will follow the Court's findings.

“During the course of Plaintiff's application for a Certificate of Citizenship, he and his alleged father were requested to take a blood test. *This, Plaintiff*

and his alleged father voluntarily agreed to do, as evidenced by documents signed by them, and which were explained to them through a Chinese interpreter at the Immigration and Naturalization Service" (emphasis supplied) (Court's finding V) (R. 14). See also (R. 108-11, 116-117, 163-164; Defendant's Ex. Nos. 1 and 2).

"Plaintiff and his alleged father went to the office of the Blood Bank of Hawaii, Honolulu, T.H., where blood was drawn from the arms of each of them." (R. 15, 131—compare R. 160-163).

"The blood so extracted was tested under extremely carefully controlled conditions by two qualified technicians and were compiled and sent to the doctor who himself was a highly qualified expert Serologist. The doctor correlated the results of the blood tests as compiled by technicians" (R. 15). (This finding is amply supported by the evidence, see testimony of Ann Stegmaier (R. 200-268), Katherine Young (R. 270-319), and Leon E. Mermod (R. 320-347).

"The mechanics of the blood tests were done with such care that any possibility of error was reduced to a minimum, and the alleged discrepancy raised concerning the worksheet only goes to prove that the control methods used by the Blood Bank of Hawaii are excellent, and the results of the blood tests should be given great weight." (R. 15). This finding is supported by the testimony of Stegmaier, Young, and Mermod noted above.

"The results showed that as relates to the MN blood typing, the alleged father had type N blood

and the alleged son and Plaintiff herein had type M blood.” (R. 15; Defendant’s Ex. Nos. 5 and 7).

“The results of the blood tests show conclusively that Ng Hung Way, the alleged father of the Plaintiff, cannot possibly be the father of the Plaintiff.” (R. 15, 333-335).

STATUTES INVOLVED.

Section 360(a), Immigration & Nationality Act, 8 USC §1503(a).

“If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States. . . .”

QUESTIONS PRESENTED ON APPEAL.

The only question raised is whether the Appellee has met his burden of going forward with the evidence. The myriad of questions presented and specifications of error of Appellant all relate to the one issue.

SUMMARY OF ARGUMENT.

The findings of fact of the Court are supported by overwhelming evidence. There is nothing in the record which would bring the case within the clearly erroneous rule. The Trial Court's finding should not be disturbed.

I.

The Appellant alleges that there were no rules or regulations regarding the requiring of a blood test at the time Appellant was examined concerning a Certificate of Citizenship, and the Court committed "crucial error" in holding that rules and regulations existed. To bolster this statement he cites *his* proposed findings of fact on page 8, *which the Court did not accept*, together with his examination of Appellant, at page 146 of the Record and at page 148 of the Record. He also cites the oral opinion of the Court at page 326 of the Transcript (page 355 of the Record), and page 329 of the Transcript (page 358 of the Record). He at no time specifically cites the actual Findings of Fact and Conclusions of Law of the Court as filed. It will be noted that the position of the Appellee has been, from the beginning, that it has made no difference at all whether blood tests were required or not required in an application for a Certificate of Citizenship (R. 153), because blood test results are just another form of evidence and if Appellant voluntarily submitted to the taking of the blood tests, then whether they were required or not has no bearing whatsoever on the evidentiary effect of the blood tests. However, this question was thoroughly explored

in *U. S. v. Shaughnessy*, 2 Cir. 1956, 237 F. (2d) 307, at page 309 (Rev'd on other grounds, sub nom *U. S. v. Murff*, No. 32, U. S. Supreme Court, October Term 1957, decided December 9, 1957). The Court states: "The first formal authority for the use of blood tests was contained in a precedent decision of the Board of Immigration Appeals handed down on February 25, 1953. The Immigration Service first promulgated instructions relating to blood tests in early 1953. The early instructions dealt only with visa petitions and certificates of citizenship: . . .

"More recently, some time in 1954, all of those instructions were rescinded and all current instructions concerning the investigation techniques with respect to cases wherein blood tests are deemed essential or necessary do not directly or indirectly refer to any racial or nationality group by predicating the requirement on the nature of the case and the issue of paternity or the relationship which is involved. . . ." So, apparently at the time that Appellant was examined for his Certificate of Citizenship, an instruction was in existence concerning the use of blood tests in applications for Certificates of Citizenship. However, whether this is true or not, as has been stated before, it makes little or no difference since the Court has specifically found (R. 14) that Appellant and his alleged father voluntarily agreed to submit to blood tests.

II.

The Court has specifically found that Appellant and his alleged father *voluntarily* submitted to blood

tests. There is ample evidence to support this finding. Appellant's argument in his second point flies in the face of the Court's finding, for there is no statement which says the Court's finding is not supported by ample evidence. The only thing which can be said on behalf of the Appellant is that there was a conflict of evidence on this point and the trier of facts found the blood tests were voluntarily submitted to. The Appellant states: "There has been no evidence to show that Plaintiff-Appellant's father's blood test was obtained voluntarily and not by duress, or coercion and fraud." He then states that "there was proper objection to the admission of Plaintiff-Appellant's father's blood test results." As to the technical defense, first there is no specification of error alleging error in the ruling of the Court setting forth the testimony on the admission of the document complained of. However, the document was signed by Appellant's father and the document speaks for itself. It might be well to note that when the Appellee attempted to get the information from the father concerning the signing of Appellee's Exhibit I, the father refused to answer any questions concerning this document, based upon his privilege against self-incrimination. Mr. Ching testified that he explained the document to Appellant's father and that both Appellant and his father signed it (R. 137). As to the remainder of Appellant's argument concerning the "demand" to take blood tests by the Immigration Service, and that being a violation of due process of law, again the Court has made specific findings concerning the taking of a blood test, and the findings are

supported by substantial evidence (R. 14). Further, Appellant quotes repeatedly from the testimony of Appellant and his alleged father concerning this particular finding. Obviously the Court disregarded this testimony and believed Mr. Ching and the documents themselves concerning the voluntariness of the taking of the blood tests. It is well within the realm of the Trial Court, and in fact his sole responsibility, to pass on the credibility of the witnesses.

Mar Gong v. Brownell, 209 F. (2d) 448;
Chow Sing v. Brownell, 217 F. (2d) 140;
Law Don Shew v. Dulles, 217 F. (2d) 146;
Wong Ken Foon v. Brownell, 218 F. (2d) 444;
Lew Wah Fook v. Brownell, 218 F. (2d) 924;
Nishikawa v. Dulles, 235 F. (2d) 135; and
Iwamoto v. Dulles, Slip Opinion No. 15,441,
 9 Cir., decided December 10, 1957.

As to the irresponsible charges contained on page 16 of Appellant's Brief: "This was not government by law but by star chamber like tactics which is wholly and clearly abominable. It is clearly a violation of plaintiff-appellant's, or any appellant's constitutional rights to be governed by due process." Appellee has only this to say. The blood test results are merely evidence to be presented in the administrative proceeding. Appellant apparently is of the opinion that because this particular evidence is not in his favor, he must smear the government at every turn. There is no basis for the statements made, either in law or in fact and such intemperate statements such as appear on page 16 of the Brief concerning the Star Chamber should be disregarded.

III.

Appellant alleges that the proposition to be decided in III is whether or not such a rule as he has stated does not exist and violates the due process clause of the Fifth Amendment of the United States Constitution on the ground that it violates "the applicant's right of interference with his physical body or right of privacy or personality," and secondly, that the Immigration Service cannot demand a blood test without violating due process protection of a citizen, although it is not quite clear how this is applied. Also, it is not quite clear that Appellant and his father are citizens. However, be that as it may, as to the first alternative, the short answer to this proposition is that the blood tests were voluntarily submitted to by both the Appellant and his father, as shown by Defendant's Exhibits 1 and 2 in evidence. Secondly, the Appellant was not compelled to take an examination, i.e., a blood test, but it was entered into voluntarily. The Appellee would like to pause at this time and suggest to the Court that there is something very strange about the argument of the Appellant concerning the taking of his blood test for the following reasons: First, the blood tests, if submitted to, would be the only objective evidence concerning relationship in the whole case, other than the testimony of the father and the son; and secondly, it is only the father and the son who can produce this evidence, and it is wholly within their power to grant or withhold the evidence and it is stated that before a discovery that their blood was incompatible, i.e., during the application for a certificate

of citizenship, they voluntarily submitted to taking a blood test. Since that time they have violently objected to anything that relates to the blood test results and it may be inferred by the conduct of the Appellant and his alleged father herein that they would never submit to another blood test to ascertain paternity. In relation to this question presented, Appellant cites the case of *Skinner v. Oklahoma*, 316 U.S. 535 (1942). He fails to cite the latest case from the Supreme Court of the United States, *Breithaupt v. Abram*, 352 U.S. 432, which holds that a blood test taken from an unconscious person is admissible in a criminal proceeding as long as it was extracted by a doctor. The short answer, nevertheless, to the Appellant's contention here again is that the Court found there was ample evidence to support the finding that the Appellant and his father *voluntarily* submitted to the blood tests. As to the second alternative objection contained in Appellant's Brief raised under the heading Paragraph III, Appellee sees absolutely no application of this argument to the case at bar. In the first place the blood tests were not "demanded" and in the second place Appellant and his father were not compelled by Court order or administrative order to take the blood tests. Consequently, the cases cited, which state that the parties to an action may be required to undergo a physical examination which can include blood testing, have absolutely no application to the case here. Nor is it contended by the Appellee that they do. Again, the only problem presented is that voluntarily taken blood tests were used as evidence in an administrative pro-

ceeding, namely, in a proceeding where Appellant applied for a certificate of citizenship. It is to be noted that they were used as evidence and certainly there is no bar to the Immigration Service using whatever competent evidence it may lay their hands on to decide a difficult problem.

Nor are we concerned with the discussion by the Appellant of the difference (whether there really be any or not) of the treatment of an alien and a citizen as to constitutional rights, because no one's constitutional rights have been violated in any way. Appellant and his father voluntarily submitted to blood tests and Appellant submitted to them because he wanted to get a certificate of citizenship.

It is to be noted that he had already been admitted to the United States as a U. S. citizen and has had issued to him by the U. S. Government a U. S. Passport. But the crux of the situation here is that Appellant wanted his certificate of citizenship and because he wanted it he submitted to the blood tests and he voluntarily submitted to the blood tests. Unfortunately for him, the blood tests were not compatible. I am sure it is most obvious that Appellant would not be in Court today if the blood tests had turned out to be compatible and he had been issued his certificate of citizenship. Nor can the Appellee see any logic or reason in the argument made that a request to take Appellant's father's blood test is a separate violation of Appellant's constitutional rights. It is very, very basic law that one person cannot claim constitutional rights of another.

IV.

Appellant makes the following statement in his Brief, beginning on page 20, in proposing the question to this Court: "Whether or not the 'waiver of right' of plaintiff-appellant and his father is based upon the existence of a rule and regulation requiring a blood test is invalidated or voidable because of duress, coercion and fraud by the fact that no such rule and regulation existed." As has been continually argued in this brief, it makes no difference whatsoever whether a rule or regulation existed, and furthermore, it never has been the contention of the Appellee herein that a rule or regulation was necessary under any circumstances. Particularly so when the taking of the blood test was voluntary. As has been stated repeatedly, the Trial Court so found that Appellant and his father voluntarily took blood tests. Secondly, as can be gleaned from the discussion in *U. S. v. Shaughnessy*, 237 F. (2d) 307, 309, the examining officer had plenty of authority to request that Appellant take a blood test. Nor does it have anything to do with the issues herein since the blood test was voluntarily submitted to and since the Court and administrative proceedings have overwhelmingly held that blood tests, when properly conducted, are competent evidence of nonpaternity. The Court will find by examining Appellee's Exhibits 1 and 2 that the documents quoted as a "waiver of right" by Appellant is nothing more than a statement in writing by the Appellant and his father that they would be willing to take blood tests, and also, a statement that the effect

of blood test results had been explained to them. (R. 30). Appellant speaks about threats being made to him which negated his free will and that of his citizen father. There is no evidence whatsoever of these threats, and more particularly, the Court made no finding for the Court could not have made the finding that the blood tests were made voluntarily unless there had been no threats. Appellant has continually throughout this portion of his argument attempted to pull himself up by his bootstraps on testimony which obviously the Court had to disregard in order to find that the blood tests were taken voluntarily. And as has been quoted *supra*, it is the exclusive province of the Trial Court to decide the credibility of witnesses and the weight of the evidence. (Note authorities cited above).

And in conclusion as to this argument number IV, it should again be pointed out that this case should be viewed in its proper perspective for here the Appellant was applying for something from the United States Government. He had as his burden of proof to prove that he was a citizen of the United States. In order to satisfy the Immigration Examiner he was asked to take a blood test. This he voluntarily did. No matter what Appellant says, the Trial Court has found this to be a fact and he has ample evidence in which to support his finding. It seems strange now that someone who is asking for something from the Government in turn states, I want this document but you shouldn't have asked me to produce the only objective evidence available. And it is evidence which

is completely within the control of the Appellant and his father to produce. They have produced it voluntarily. It certainly is not the fault of the Government nor the Blood Bank of Hawaii that the tests were incompatible. That is nothing more than an incontestible medical fact. And again in this connection the testimony of Appellant's father as an adverse witness is drawn to the attention of the Court, where he refused to answer any questions concerning the blood testing or the blood test results. At the very least, Appellant's father is making it quite difficult for the Appellee to get at the actual facts of the case.

V.

Under V Appellant states that there is no explanation as to the significance and effect of Appellant's statement that he was willing to take a blood test. (Defendant's Exhibits Nos. 1 and 2). He further states that the evidence upon appeal clearly shows that no adequate explanation of the meaning and significance of the "alleged waiver of rights" was given this Plaintiff-Appellant and that therefore, he cannot be held to his agreement to take the blood tests. It is only necessary to refer to the testimony of Mr. Ching (R. 135-137). It is obvious that Mr. Ching, the official interpreter, explained to the Appellant and his father the contents of Appellant's Exhibits 1 and 2. It is submitted that those exhibits contained a very clear expostulation of the evidentiary effect of the blood tests. Consequently, the statement that there was no adequate explanation is without either merit

or foundation. Further, it may be noted that in the testimony of Appellant himself he states the contents of Exhibit 2 were explained to him by Mr. Ching (R. 163-164). The argument by Appellant states there is no evidence that these documents were explained by the interpreter. As noted above, apparently Appellant has overlooked his own testimony in which he admits the interpreter explained to him the contents of Exhibit 2. Also, he neglects to point out that Mr. Ching, in answer to the question as to where his explanation took place, stated:

“Q. Now, Mr. Ching, will you go back to what you were stating as to where your explanation took place?

A. Well, this started—this was started in Mr. Greenwald’s office and it ended up in the front office where formerly they had two desks at the front office, and it is right there that the signatures were signed, his signature and my signature.”

That testimony, coupled with the testimony of the Appellant himself, clearly shows that the documents were explained to the Appellant, and that Appellant’s self-serving testimony was quite apparently not believed by the Trial Court.

VI.

Apparently, although it is not very clear, Appellant is contending that the Government may not use the evidence which it secured from the blood tests in the Section 360 action because it is limited only to the action of the denial of the certificate of citizen-

ship. It is contended by the Government that this argument, if it is not frivolous, borders thereupon, for in the Section 360 action the Appellant is complaining that he had a right or privilege as a U. S. citizen denied to him in the certificate of citizenship proceeding, and he is now saying that although it was denied in that proceeding the evidence adduced therein cannot be used in the Section 360 action. However, he states that this is a contractual agreement and it cannot be used in any other proceeding.

There is no limitation contained in the agreement as such. Appellant apparently finds comfort in the following statement taken from the agreement (R. 301): "I, Et Min Ng, holder of blank and presently residing at 1450 Alencastre Street agree to submit to a blood test to determine my blood type and RH factor in connection with application for Certificate of Citizenship." The Appellee contends that this is no limitation at all as to whether the evidence can be used. It merely states that the Appellant agreed to submit to a blood test to determine his blood type in relation to an application for a certificate of citizenship. However, the evidence adduced from the blood tests themselves may be used in any way the Appellant or Appellee see fit. In addition, this complaint was filed on the basis that Plaintiff had been denied a right or privilege as a national of the United States, on the ground he was not a national of the United States, in an application for a certificate of citizenship, to wit, the very one for which the evidence of the blood test was originally taken.

VII.

Appellant attacks the reliability of the blood test results on the basis that it does not measure up to the judicial standard, relying on *U. S. v. Shaughnessy*, 115 F. Supp. 302, at 306-308, and Disputed Paternity Proceedings, 3rd Ed., 1953, by Sidney Schatkin. The situation described by Mr. Schatkin is entirely different from the situation found herein. In the first place, the Court, in paternity proceedings in almost every jurisdiction, has the power to require submission to blood tests. Consequently, the blood tests may be set up on the line Mr. Schatkin suggested. However, here in Hawaii, in the middle of the Pacific, the blood testing was turned over to an independent agency, the Blood Bank of Hawaii. It has no relationship to the United States Government, or to the Appellant, and only from a careful reading of the testimony of the employees of the Blood Bank of Hawaii and of Dr. Mermod himself, can it be ascertained the care or conversely the lack thereof used in blood testing. It may be inferred from the testimony and conduct of the Appellant and his claimed father concerning the blood testing that they would never resubmit to blood tests voluntarily. That apparently is the reason for the concentrated attack on the blood testing made herein. It will be noted from the Record at pages 225-228 that a third person also checked the results. Out of an abundance of caution the Trial Court struck all of the testimony concerning the third person's testing, not on the ground it was not done, but that it might possibly be based on

hearsay evidence. Both Katherine Young and Miss Stegmaier, the technicians who performed the manual portions of the blood tests, are expert technicians at doing this type of laboratory work. Both had done innumerable tests of this type and as their testimony amply shows, they were well aware of the importance of being extremely careful in this type of laboratory work. The Appellant makes a great deal of the changed letters in the MN blood group of Katherine Young's writing. Katherine Young's testimony was taken by deposition and her testimony concerning the worksheet was made from a photostatic copy of the original thereof. However, Appellant was not represented at this deposition, although due notice was served. (R. 270). The alteration on the letters was not called to anyone's attention until Appellant's argument before the Court. At that time it was called to the attention of the Court and to the attorneys for the defense. However, be that as it may, the Court found that this alleged discrepancy only went to show the carefulness of the checking of the blood tests by the Blood Bank of Hawaii, a finding which is amply supported by the evidence and the final outcome of the tests could easily have been conformed by calling the third technician, Mrs. Maeda, as a witness, if it were known prior to the closing of the evidence that this strike over had been made. However, be that as it may, because of the whole setup of the method of the Blood Bank of Hawaii, it is not only abundantly clear but it is so clear as to be beyond doubt that, as the Court has characterized it, these tests were

conducted under "extremely careful, controlled conditions by two qualified technicians" and that the results so tabulated were compiled and sent to the doctor who correlated the results. Apparently, Appellant, after drinking deeply of the thoughts of Sidney Schatkin, feels that his solution is the only solution to blood testing; that this method used by the Blood Bank of Hawaii is not equally satisfactory. This, of course, the Appellee does not agree with, nor does the Court, since the whole method gives one confidence in the fact that if any mistake were made by any technician that through the method of retesting the mistake would be caught and if the change of the N to a M on the worksheet was not just a human typographical error but actually an error in the testing and it was changed, under either circumstance, the method shows that the Blood Bank of Hawaii's system is extremely good, and certainly measures up to the standard of carefulness required by the Courts, particularly so when it is quite obvious that never again will the Appellant be "hoodwinked" into taking a blood test. As to Appellant's allegation concerning the expertness of Dr. Mermod, all that the Appellee can state is to refer this Court to the record herein to Dr. Mermod's testimony and that his testimony leaves no doubt that he is qualified to testify concerning these tests.

VIII.

Appellant in his final point made in his brief states that the question presented is whether the blood test and its results, if admissible at all is not alone con-

clusive evidence of non-paternity so as to conclusively rebut Appellant's prima facie case. In this connection, again, the whole thread of Appellant's argument has to be examined since it attempts without any degree of success to pick to pieces the carefulness of the blood test carried on by the Blood Bank of Hawaii. It also ignores completely the Court's findings supported by ample evidence that the blood test was carried on in an extremely careful manner. The case cited to this Court *Chin Wing Gwong v. Dulles*, 139 F.S. 116, at page 120, deals with the fact that blood tests were made by Dr. Veo at Hong Kong and that there was no opportunity afforded to the parties therein to examine Dr. Veo. Obviously this case is distinguishable on its facts since everyone connected with the blood tests was subjected to long searching examination by counsel for Appellant. Further, the stubborn reliance upon his prima facie case does not move the Appellee. A prima facie case is a minimum amount of proof.

Louie Hoy Gay v. Dulles, 9 Cir. 1957, Slip Opinion No. 15390 decided September 12, 1957; and

Mah Toi v. Brownell, 9 Cir. 1955, 219 F. (2d) 642, 644, cert. den. 1955, 350 U.S. 823.

Further, the blood test results, if the finder of facts, i.e., the Trial Court, are to be believed, were quite persuasive evidence; and certainly if they are to be considered at all they must meet the judicial standard of reliability, and if they do reach that standard there is no question but that they will overcome the minimum amount of evidence produced by the Appellant

to establish his prima facie case. With the results of the blood test balanced against Appellant's and his claimed father's self-serving testimony, it is not hard to understand why the Trial Court could find that the evidence did not prevail in favor of the Appellant.

SEPARATE ANSWERING ARGUMENT.

Appellant's arguments have been answered in the order presented and one further point should be made, although it has been reiterated throughout this brief. The Trial Court found from the testimony adduced two specific points to which Appellant most strenuously objected. One is that the Appellant voluntarily submitted to a blood test, and two, that the blood tests themselves were very carefully carried out and that there was no error. Possibility of an error was reduced to the minimum. It would seem to Appellee that the findings will have to be clearly erroneous before they could be overturned on appeal, and certainly Appellee contends that they were not clearly erroneous, and that in fact it was supported by ample substantial evidence as has been argued throughout the brief.

Rule 52(a), Federal Rules of Civil Procedure;
Mar Gong v. Brownell, 209 F. (2d) 448;
Chow Sing v. Brownell, 217 F. (2d) 140;
Law Don Shew v. Dulles, 217 F. (2d) 146;
Wong Ken Foon v. Brownell, 218 F. (2d) 444;
Lew Wah Fook v. Brownell, 218 F. (2d) 924;

Nishikawa v. Dulles, 235 F. (2d) 135; and
Iwamoto v. Dulles, Slip Opinion No. 15,441,
9 Cir., decided December 10, 1957.

CONCLUSION.

Appellee contends that it is quite clear that the Court's findings were supported by ample substantial evidence; that with this in mind, the Court's findings certainly were not clearly erroneous; and in fact they were absolutely correct. It is submitted that no error whatsoever was committed by the Trial Court.

Dated, Honolulu, T.H.,
January 7, 1958.

Respectfully submitted,

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No. 15,768

IN THE

**United States Court of Appeals
For the Ninth Circuit**

*See also
No. 14753
Vol. 3034*

LAU AH YEW,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of
State of the United States,

Appellee.

**On Appeal from the United States District Court for the
District of Hawaii in Civil No. 1254.**

BRIEF FOR APPELLEE.

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No. 15,768

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LAU AH YEW,

Appellant,

VS.

JOHN FOSTER DULLES, Secretary of
State of the United States,

Appellee.

On Appeal from the United States District Court for the
District of Hawaii in Civil No. 1254.

BRIEF FOR APPELLEE.

**STATEMENT OF FACTS AND LAW
DISCLOSING JURISDICTION.**

Appellee agrees with the jurisdictional statement of Appellant as far as it goes, however, the following is added:

The Fourth Amended Complaint was filed on November 14, 1956 (R. 2-4). An Answer was filed by the Appellee on November 16, 1956 (R. 5-6). Jurisdiction of the District Court is based upon Section 503 of the Nationality Act of 1940; 54 Stat. 1171, et seq., 8 U.S.C. former Section 903. Judgment was entered in favor of the Appellee on June 28, 1957 (R. 20), and Notice of Appeal was dated July 23, 1957 (R. 21)

and filed July 24, 1957 (R. 23). Jurisdiction of this Court is based on 28 U.S.C. Sections 1291 and 1294(a).

STATEMENT OF FACTS.

Appellee does not agree with Appellant's statement of the facts and, consequently, presents his own statement of facts. Appellant claims that he was born in Honolulu on February 1, 1898 (R. 42). Appellant also claims that he was taken to China by his father about a year after his birth (R. 49), and states also that soon after his arrival in China his father died (R. 49). In 1915 the person who the Appellant claims to be was admitted to the United States on primary inspection (R. 43, Defendant's Exhibit E, R. 107, 109). At that time three witnesses appeared and testified on behalf of this person who Appellant claims to be (R. 43, 65-66, Plaintiff's Exhibit 1). Appellant claims that he applied for a Certificate of Citizenship—Hawaiian Islands, at the Immigration and Naturalization Service in Honolulu, T. H., and that this Certificate was refused (R. 44, 45). He also claims that he applied for a U.S. passport to China in 1947, which was refused. Appellant claims to have "applied for a passport to return to the United States in Hong Kong" (R. 46-47). The Trial Court found that the evidence presented by the Appellant is not worthy of belief (R. 17), and further found there was no evidence worthy of belief that substantiates the identity of the Appellant as the person admitted to the United States in 1915 (R. 18).

The Court found also that the person admitted in 1915 is an imposter (R. 18).

The Court found further that the Appellant upon material points could not tie his story in with the substantiating witnesses in the 1915 hearing (R. 18, 19).

STATUTES INVOLVED.

Section 503, Immigration and Nationality Act

§903. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. . . .

QUESTIONS PRESENTED ON APPEAL.

The Appellant has presented three questions of fact on appeal and one mixed question of law and fact.

The question of law presented concerns whether the Appellant or the Appellee had the burden of going

forward with the evidence and also concerns the quantum of evidence required of the Appellee in this type of case.

The questions of fact presented attack particular findings of the Trial Court and will be discussed in the order presented by Appellant.

SUMMARY OF ARGUMENT.

The Appellant has failed to establish his case by a preponderance of the evidence. Whether Appellant has actually established a *prima facie* case or not, Appellee's evidence and cross-examination of Appellant has demonstrated the complete failure of proof of Appellant's case.

ARGUMENT.

I.

Appellant's arguments will be answered in the order presented. The first two errors alleged are apparently that the Court wrongly characterized this case as an exclusion case, and the attendant burden of proof. The theory of the case and the method of proof adopted by the Appellant will have to be examined to explain this characterization.

Appellant's theory is apparently the following: He established that a person named Lau Ah You was admitted to the United States at Honolulu on primary inspection by an immigrant inspector. The Appellant

contends that this establishes a prima facie case of United States nationality, citing *Delmore v. Brownell*, (3 Cir. 1956), 236 F. (2d) 598. (Cited in his brief under the name of *Delmore v. U. S.*, 136 F. (2d) 599).

Prior admission as a U. S. citizen particularly when made does not create a presumption or prima facie case in favor of the person admitted. It may be considered as evidence along with all other facts, and it is only the duty of the Court to consider the prior admission. *Wong Chow Gin v. Cahill*, 79 F. (2d) 854; *Lum Mon Sing v. U. S.*, 9 Cir., 124 F. (2d) 21; *Flynn v. Ward*, 1 Cir. 1938, 95 F. (2d) 742; *Mock Kee Song v. Cahill*, 9 Cir. 1938, 94 F. (2d) 975; *Mah Toi v. Brownell*, 9 Cir. 1955, 219 F. (2d) 642, cert. den. 350 U.S. 823, 76 S.Ct. 49; and *Louie Hoy Gay v. Dulles*, 9 Cir., Slip Opinion No. 15,390, decided September 12, 1957.

A comparison was made during the trial of the differing burdens of proof in deportation (burden on the Government), and in exclusion (burden on the person seeking admission). Since Appellant apparently does not contend that he has no burden of proof, the characterization of the case as being like an exclusion case by the Court is not erroneous in the first place. The pleadings obviously show this case to be a normal "identity" type of action instituted under Section 503, Nationality Act of 1940 (8 U.S.C. former Section 903).

Consequently, the characterization of the case as an exclusion type case merely points out that the burden is not on the Government to disprove citizenship in

the first instance. In this case, as in an exclusion case, the burden is upon the Appellant to establish his citizenship by a fair preponderance of the evidence. *Ly Shew v. Dulles*, 9 Cir. 1954, 219 F. (2d) 413; *Mah Toi v. Brownell, supra*; and *Louie Hoy Gay v. Dulles, supra*.

Appellant places great reliance on *Ah Kong v. Dulles*, (U.S. D.C. N.J., 1955), 130 F. Supp. 546. The *Ah Kong* case, if for no other reason is easily distinguished on the facts. There a U. S. Commissioner found that Ah Kong was a citizen and the Immigration Service has repeatedly made findings that Ah Kong was a citizen.

For the purposes of argument, let's concede that Appellant's theory of law is correct, that a prima facie case was set out by proof of admission on primary inspection.

The Court also found that there was no evidence worthy of belief that Appellant was the person admitted to the United States on primary inspection (R. 18). This is an indispensable element of Appellant's case under any theory of law. In order to do this the Court had to do two things. He had to find that Appellant's testimony is unreliable, and further, he had to give no weight to the testimony of his attorney. Once this is done there is no other evidence establishing identity and, consequently, a complete failure of proof of a prima facie case.

Secondly, a prima facie case has a "minimal" amount of evidence supporting it. *Mah Toi v. Brownell, supra*; and *Louie Hoy Gay v. Dulles, supra*.

It is apparently the law of this circuit that the defendant in this type of case has no extraordinary burden of proof. *Ly Shew v. Dulles, supra*; *Mah Toi v. Brownell, supra*; and *Louie Hoy Gay v. Dulles, supra*. This is not the case of a person whose citizenship is being taken away in a denaturalization proceeding (*Baumgartner v. U. S.*, 332 U.S. 665), or whose citizenship is admitted except for alleged acts of expatriation. The real issue in this case is the Appellant's identity as a U. S. citizen. Appellee's evidence, together with the insubstantiality of Appellant's proof, reveals that the Trial Court committed no error. That the evidence presented did not preponderate in favor of the Appellant.

Appellant has made the statement in his brief that "The burden of proof in an exclusion proceeding is entirely upon the plaintiff-alien and his burden of proof is to show without doubt that he is a citizen of this country. *Wong Choy v. Haff*, 83 F. (2d) 963." (Br. 14). Appellant's statement that the burden of proof is to show without a doubt that he is a citizen of this country is not supported by the case. Appellee has been unable to find any authority to that effect and it is certainly not found in the case cited.

III.

Appellant's final argument is clearly a factual one. Since he is not satisfied with the Trial Court's evaluation of the evidence he wants this Court to refine the facts—this time in his favor. As far as the Trial Court is concerned Appellant must be considered to

have established the minimum amount of evidence (without regard to its weight or the credibility of witnesses), since Appellee's motion to dismiss at the close of Appellant's evidence was denied (R. 64.)

The question of Appellant's identity has been touched upon supra. However, the only testimony of actual identity of the Appellant came from his attorney (R. 90-92). This evidence the Trial Court *chose to disbelieve*. The Trial Court found there was no evidence worthy of belief on the question of identity (R. 18), not as Appellant states no evidence at all (Br. 17).

The Form I-404-a, coupled with testimony of Alice Thoene, admitted by waiver of objection (R. 101-102) shows that a person by the name of Lau Ah Yew was admitted to the United States on primary inspection and that there was no hearing before a board of Special Inquiry (R. 106-109).

The departure record was admitted in evidence on stipulation. The Court found that this departure record was the one claimed by Appellant. See Plaintiff's Exhibit 1. And that in view of Appellant's testimony the departure record did not relate to him. In other words, the basis of the prima facie case (if there be one) is being attacked. The Immigrant Inspector based the decision partly on the departure record (see Plaintiff's Exhibit 1). He also based his decision on testimony of witnesses. Appellant's claimed witnesses (on his claimed admission into United States) testified that they saw his father as late as 1913 in China. He was admitted in 1915.

Appellant also testified that his father was in China at that time (Plaintiff's Exhibit 1). There was no mention of a stepfather in 1915 at the time of his entry. Now Appellant testifies that his father died when he was very young and he had an adopted father. This is a good indication of the unreliability of witnesses who testified in Appellant's behalf in 1915. This also weakens any prima facie case which Appellant may have had. Appellant makes the following statement at page 22 of his brief, "Appellant's adopted father was alive at that time and one witness had knowledge of two fathers, one dead and one alive (Tr. 40, L. 19-20)."

Appellee has searched the record to find where the witness himself showed any knowledge of Appellant having two fathers other than Appellant's self-serving statement. It certainly does not show up in the 1915 hearing (Plaintiff's Exhibit 1).

The Appellant's testimony is unreliable. It is not only unreliable about things which are alleged to have happened many years ago, but about things of more recent date. It is undoubtedly because of this unreliability that the Trial Court chose to disregard his testimony.

Appellant stresses the Certificate of Identity introduced by Appellant. The weight to be given a Certificate of Identity is aptly described by this Court in *Louie Hoy Gay v. Dulles, supra*, at page 11. The Certificate has no bearing whatsoever on whether the man himself is a citizen, particularly so when there is no believable evidence that Appellant is the person

to whom the Certificate relates. The Certificate came from the Immigration file of Lau Ah Yew (R. 7).

In addition, Appellant failing to get United States identity and travel documents secured a Chinese Passport from the Consulate in Honolulu (R. 87, 88). Further, the passport states his Native District as Chungshan, China (R. 59).

CONCLUSION.

The Court did not err in its findings. Appellant's testimony is completely unreliable from start to finish. If a prima facie case was established then it has been overcome by evidence in the record. The Court did not err in finding the burden of proof to be on the Plaintiff-Appellant, or in disregarding the *Delmore* case which apparently stands alone.

Dated, Honolulu, T.H.,
January 14, 1958.

Respectfully submitted,

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No. 15774

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT EDWARD DEUTSCHMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 15774
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALBERT EDWARD DEUTSCHMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

**Jurisdictional Statement
and
Statement of the Case.**

The Government accepts the statements of jurisdiction and statement of the case as presented by the appellant.

II.

Argument.

A. The Original Sentence Was Void and Illegal.

Appellant adopts an interesting attitude. He states, in effect, that the sentence is entire, *i.e.*, a single sentence, that he began to serve that sentence on June 17, 1957, and that the re-sentencing on the following day was therefore an idle act. Appellee agrees that the sentence should

properly be considered as entire. *Cf. Affronti v. United States*, 350 U. S. 79. However, we disagree with the appellant's conclusions that service of sentence began on June 17, 1957 and that the re-sentencing was illegal.

Appellant's quotation of the statute involved is accurate. The statute incorporates, however, subdivision (d) of Section 7237, Title 26, United States Code, which provides, among other things, that *neither the imposition nor execution of sentence may be suspended* in the type of case here involved. The penalty therein provides that a person convicted under Section 174, Title 21, United States Code, "shall be imprisoned not less than five or more than twenty years" for each offense. Appellant was convicted of two such offenses. His sentence on Count One was proper. His consecutive sentence on Count Three was improper, illegal and void, in that the court had no power under the statute to suspend imposition of sentence.

Title 21, U. S. C., Sec. 174;

Title 26, U. S. C., Sec. 7237(d);

United States v. Bozza, 155 F. 2d 592, 595 (3 Cir., 1946); *Affd.* 330 U. S. 160;

Anderson v. Rives, 85 F. 2d 673, 674 (D. C. Cir., 1936);

Hammers v. United States, 279 Fed. 265, 266 (5 Cir., 1922).

Accepting appellant's contention that the sentence was entire, then it was *entirely illegal*.

Rule 35 of the Federal Rules of Criminal Procedure provides:

"The court may correct an illegal sentence at any time."

The trial court therefore properly recalled the appellant on June 18, 1957 and entered a sentence within its power.

A void sentence does not require the prisoner's release, but requires his return to the court for proper sentence.

Ruben v. Welch, 159 F. 2d 493, 494 (4 Cir., 1947);
cert. den. 331 U. S. 814.

Appropriate to the instant case is the language of the United States Supreme Court in *Bozza v. United States*, 330 U. S. 160, 167:

"In this case the court 'only set aside what it had no authority to do and substitute[d] directions required by the law to be done upon the conviction of the offender.' "

So here the court did only what the law required it to do. The first sentence was a nullity and defendant therefore could not begin to serve it. The valid sentence was properly imposed the following day.

B. No Double Jeopardy.

Appellant was not placed in double jeopardy by the re-sentencing. *Bozza v. United States*, 330 U. S. 160. In that case the Supreme Court said, at 166-167:

"The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."

Yet the gist of appellant's contention is that since the judge erred in his sentence on Count Three, he could not thereafter correct the error. To state the proposition is sufficient to indicate its fallacy.

The principal cases upon which appellant relies do not consider the question of re-sentencing after an illegal

sentence, and are therefore inapposite. It is only when service of a valid sentence has begun that the court loses its power to increase the punishment.

Pollard v. United States, 352 U. S. 354, 361;

Wilson v. Buck, 137 F. 2d 716, 721 (6 Cir., 1943).

C. Alternative Reasoning.

If a different approach to the problem is adopted and the sentence is considered to be severable as to the various counts, then appellant had begun to serve the valid sentence on Count One of the indictment. It has been held that where consecutive sentences are imposed, without more, they are to be served consecutively in the same order in which they appear in the indictment.

United States v. Daugherty, 269 U. S. 360;

Henry v. Madigan, 241 F. 2d 659 (9 Cir., 1957).

Under this line of reasoning he still could not be held to have commenced service of the unauthorized probationary sentence originally imposed on Count Three. That was the only part of the sentence which was changed at the re-sentencing on June 18, and this was certainly proper under the *Bozza* cases, *supra*, and other cases cited therewith, and in accordance with the requirements of Rule 35, Federal Rules of Criminal Procedure.

III.

Conclusions.

1. The trial court's initial sentence was not provided for by statute; therefore it was a void act.

2. There is undisputed authority for the proposition that a void sentence may be corrected at almost any time thereafter.

3. Since the initial sentence in the instant case was void, the subsequent valid sentence imposed by the trial court did not place appellant in double jeopardy.

Therefore, the Government respectfully requests that the judgment of the trial court be affirmed.

Respectfully submitted,

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United States Attorney,

LLOYD F. DUNN,

Assistant U. S. Attorney,

Chief, Criminal Division,

*Attorneys for Appellee, United States
of America.*

No. 15,779

IN THE
United States Court of Appeals
For the Ninth Circuit

ABRAHAM CHALUPOWITZ,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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No. 15,779

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ABRAHAM CHALUPOWITZ,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title 28 United States Code.

STATEMENT OF CASE.

Appellant was indicted May 2, 1951. The indictment in four counts, alleged violation of the narcotic laws of the United States. The first count charged that appellant, on December 8, 1950, sold, dispensed and distributed 211 grains of heroin not in or from the original stamped package in violation of the Harrison Narcotic Act. The second count charged that

appellant, at the time and place mentioned in the first count, concealed and facilitated the concealment of 211 grains of heroin in violation of the Jones Miller Act. The third count charged that appellant, on the 14th day of December, 1950, sold, dispensed and distributed 5 ounces 14 grains of heroin not in or from the original stamped package, in violation of the Harrison Narcotic Act. The fourth count charged that appellant concealed and facilitated the concealment of 5 ounces and 14 grains of heroin at the time and place mentioned in the third count of the indictment, in violation of the Jones Miller Act.

On May 3, 1951 appellant, represented by Kenneth Zwerin, a member of the bar of United States District Court for the Northern District of California, was arraigned.

On May 10, 1951 appellant, represented by counsel, plead not guilty.

On June 15, 1951 George T. Davis, a member of the bar of the United States District Court for the Northern District of California, was substituted for Kenneth Zwerin as appellant's counsel of record. The substitution took place in open Court and in appellant's presence, without his objection, before Judge Edward P. Murphy of the United States District Court for the Northern District of California.

On August 17, 1951 appellant withdrew his plea of not guilty to counts 1 and 2 of the indictment, and moved to dismiss counts 3 and 4.

Counsel for the government immediately thereafter stated:

“Mr. Karesh. May I say this, Your Honor, I informed counsel while we would have no objection to Counts 3 and 4 being dismissed, it was primarily the concern of this Court. I informed counsel that if Counts 3 and 4 were dismissed and a plea was permitted to the first and second counts, after conference with the Bureau of Narcotics, that we would ask the court, on behalf of the United States Attorney’s office and the Bureau of Narcotics to impose the maximum sentence on both counts and the maximum fines.”

Counsel for the government then asked counsel for appellant whether or not the statement was correct.

Counsel for appellant, in presence of appellant, stated: “Yes, substantially.” Thereafter counsel for appellant stated that Mr. Karesh had told him that he was going to ask for the maximum fine and the maximum penalty.

The Court then granted permission to plead to the first and second counts.

The Clerk then asked appellant whether it was his wish to withdraw his previous plea to the indictment, and appellant answered, “Yes.”

Appellant was then asked what his plea to counts 1 and 2 of the indictment was, and he stated guilty.

The Court then imposed a sentence of 5 years and a fine of \$2,000 on the first count of the indictment, and a sentence of 10 years and a \$5,000 fine on the second count of the indictment. The term of imprisonment on the second count of the indictment was to commence and run from and after the expiration of

the term of imprisonment imposed on the first count of the indictment, which was the maximum sentence imposed by law.

On January 3, 1955 Judge Murphy denied a motion on the part of petitioner to modify sentence. The motion for modification did not allege any of the grounds urged here. Judge Murphy indicated that he had reviewed the entire file and proceedings and could see no reason for a modification of appellant's sentence. This motion for modification was made at the expiration of appellant's term of imprisonment on the first count of the indictment.

It appears from the affidavit of John H. Riordan, Jr., Assistant United States Attorney, which was filed in conjunction with appellee's motion to dismiss and for summary judgment that appellant appeared as a witness for the defense in the case of *United States v. Mario Balestreri*, C.R. No. 33192, in the United States District Court for the Northern District of California on August 20, 1953. At that time appellant was asked by counsel for the government whether he was convicted in San Francisco for violation of the narcotic laws. Appellant answered:

"A. That is right.

Q. And you are serving a fifteen year sentence?

A. That is right.

Q. At the time you were convicted in 1951 for violation of the Narcotic Laws here in San Francisco you were a parolee, is that correct?

A. Not a—on probation.

Q. You were on probation?

A. I was on conditional release.

Q. That was a conditional release from Fort Worth, Texas?

A. That is probation. And I plead guilty in the Court. I [109] wasn't tried. I was guilty and I plead guilty.

Q. That was here you plead guilty?

A. Yes.

Q. In San Francisco, before Judge Goodman?

A. No, sir.

Q. Judge Murphy?

A. Judge Murphy.

Q. In the United States District Court for this district?

A. That is right.

Q. By the way, you were represented by an attorney, though, at that time? At the time you plead guilty here in San Francisco in 1951 for conspiring to violate the Narcotic Laws you had an attorney?

A. Yes, sir.

Q. You weren't tried? You pleaded guilty to the conspiracy charge, is that correct?

A. I pleaded guilty. I was guilty and I pleaded guilty.

Q. You were guilty and you pleaded guilty?

A. Pled guilty."

On June 18, 1957 appellant filed a motion to vacate his sentence pursuant to Section 2255 of Title 28 United States Code. On August 22, 1957 the United States moved to dismiss and for summary judgment. On September 9, 1957 the Court denied appellant's motion to vacate sentence. Appeal was then made to this Court.

OPINION OF THE COURT BELOW.

On August 17, 1951, Abraham Chalupowitz pleaded guilty to counts one and two of a four-count indictment charging him with violations of the Federal narcotics statutes. Counts three and four were dismissed. He was sentenced to serve a term of five years imprisonment and pay a \$2,000.00 fine on count one and to serve a term of ten years imprisonment and pay a \$5,000.00 fine on count two, the terms of imprisonment to run consecutively.

He has served the five-year term of imprisonment imposed on count one and now moves the Court, six years after imposition of sentence, pursuant to 28 U.S.C. 2255, to vacate the sentence imposed on count two. The ground of his motion is that at the time he entered his plea of guilty he did not have the effective assistance of counsel because his attorney had falsely represented to him that the prosecuting attorney and the trial judge had agreed that if he pleaded guilty to counts one and two he would receive a sentence of one-year on count one, no sentence on count two, and would be deported after serving one-third of the sentence on count one.

The United States has moved for denial of the motion to vacate sentence on the ground that the files and records of the case conclusively show that Chalupowitz is entitled to no relief.

The reporter's transcript of the proceedings upon the entry of Chalupowitz's plea of guilty on August 17, 1951 reveals the following pertinent statements:

“Mr. Davis (Defendant’s Attorney). At this time, as I understand it, there will be a plea. We will ask the Court for permission to withdraw the plea of not guilty to Counts 1 and 2 of the indictment numbered 329—whatever it is—32937—that is Counts 1 and 2. That is the one count under the Jones Act, as I understand it, and one count under the Harrison Act. I would like to make a motion at this time, Your Honor, that Counts 3 and 4 be dismissed.

Mr. Karesh (The United States Attorney). May I say this, Your Honor, I informed counsel while we would have no objection to Counts 3 and 4 being dismissed, it was primarily the concern of this Court. I informed counsel that if Counts 3 and 4 were dismissed and a plea was permitted to the first and second counts, after conference with the Bureau of Narcotics, that we would ask the Court, on behalf of the United States Attorney’s Office and the Bureau of Narcotics, to impose the maximum sentence on both counts and the maximum fines. I think Mr. Davis will bear me out that the Court could not be bound; we are not attempting to bind the Court by this. We would have no objection and the Bureau of Narcotics would have no objection. The ultimate decision is, of course, for the Court. Is that correct Mr. Davis?

Mr. Davis. Yes, substantially. But I would like to just clarify one thought or two. My understanding was, of course, that no one was to be bound; that is, certainly the Court will not be bound in any way by any discussions of ours. Mr. Karesh told me that he was going to ask for a maximum fine and maximum penalty, but, of course, it was also understood that I would have

something to say to the Court, also, and I think we are of the opinion that the Court will decide this matter on its merits and not on the basis of what the Narcotics Bureau wants. Now, also part of our understanding, that as to that second indictment, this 33000, that Mr. Karesh would take it up with the Department and would request that it be dismissed, on the theory that whatever action is taken in connection with this case will cover the situation.

Mr. Karesh. I may say, Your Honor, I told that to Mr. Davis, after conference with the Bureau of Narcotics, if the plea was entered in this case that we would recommend to the Department the dismissal of the second indictment. I, of course, said that the Department would not necessarily go along with my recommendation, but I did it after conference with the Bureau of Narcotics and after conference with members of our office.

The Court. All right. Permission is granted to plead to the first and second counts, and I will rule on the matter of dismissing the others after hearing from the Agent.

The Clerk. Abraham Chalupowitz, is it your wish to withdraw your previous plea to this indictment as this time?

The Defendant. Yes.

The Clerk. What is your plea to counts 1 and 2 of the indictment, guilty or not guilty?

The Defendant. Guilty."

Chalupowitz freely entered his plea of guilty in the face of the definite and unequivocal statement in open Court by his attorney that it was understood that the

government would ask for the maximum sentence on counts one and two, and that the Court would not be bound in any way by any discussion between counsel. Chalupowitz does not claim that there was in fact an arrangement between his attorney and the United States Attorney and the trial judge for him to receive a lesser sentence. He alleges only that his attorney falsely informed him that such an arrangement had been made. Assuming the truth of this allegation, he could not reasonably have relied on such representation by his attorney, after hearing the statement of the United States Attorney made in open Court and his own attorney's acquiescence therein prior to his guilty plea.

The record in this case clearly shows that Chalupowitz is not entitled to any relief. His motion to vacate the sentence on count two of the indictment is denied.

“Dated: September 9, 1957.”

ARGUMENT.

Appellant makes various claims concerning his plea of guilty to two counts of violation of the narcotic laws of the United States. In substance, he asserts that the attorney representing him at the time of his plea of guilty represented to him that he would receive less than the sentence which he received. His expectation in that respect, according to his affidavit, was that he would receive one year on count one, but

that there would be no sentence on count two of the indictment. (Page 5, appellant's affidavit.) Apparently, appellant does not contend that he was not guilty of count one of the indictment.

I. APPELLANT MAY NOT CLAIM HIS SENTENCE WAS ILLEGAL BECAUSE HE RECEIVED MORE OF A SENTENCE THAN HE EXPECTED.

The Court of Appeals for the Eighth Circuit in *Sweeden v. United States* (8th Cir.), 209 F.2d 524, stated:

“That the sentences were more severe than he anticipated is of no consequence as far as their legality is concerned.”

Appellant's contentions amount to no more than that he expected one year and received fifteen. The cases uniformly have held that more than this is required to invalidate a judgment.

Appellant inferentially admits his guilt as to the first count of the indictment, which charged a sale of heroin. The second count of the indictment charged the concealment of the same heroin referred to in the first count of the indictment. The charges are so connected it seems difficult to believe appellant's protestations of innocence as to the second count of the indictment.

However, appellant does not allege that he did not understand the nature of the plea of guilty. He merely claims that he expected leniency to be shown to him by the Court. Appellant has vast experience

in the consequences involved in entering a plea to a criminal charge. The records of his case reflect that on three prior occasions he was convicted of narcotic charges in the United States Courts.

Since appellant was experienced in the process of criminal law, and since he does not claim in his affidavit that he did not understand the nature of the plea of guilty his contentions deal only with the length of his sentence. Appellant has admitted all of the essential elements of his offense by his plea of guilty. Section 2255 of Title 28 United States Code does not authorize a motion to vacate a judgment on the grounds that the sentence is too long, unless that sentence is in excess of the maximum authorized by law. Appellant's admission of his guilt of the offense, together with his presumed understanding of the nature of the plea, authorized the Court to impose any sentence authorized by law. Judge Murphy imposed such a sentence. Appellant's allegations, therefore, even if they be true, would not authorize his release.

II. APPELLANT DOES NOT ALLEGE MISCONDUCT ON THE PART OF THE UNITED STATES ATTORNEY OR THE COURT.

Appellant in no place alleges that his entry of the plea was induced by any representations made by the Court or the government. His only claim is that he was *told* by his counsel that such representations had been made. The statements made by Mr. Davis, if indeed he made any such statements, concerning what

was told to him by the Court and government counsel, as alleged in appellant's affidavit, are the merest hearsay. Appellant could not testify as to such statements at any hearing which might be held. The contentions he makes cannot amount to a showing of any fraud on the part of the Court or the government.

When the infirmity in a habeas corpus claim or 2255 proceeding goes to the entry of a plea of guilty, the promises must be alleged to be made by the United States Attorney or the District Judge.

Meredith v. U.S. (4th Cir.), 208 F.2d 680;

Tabor v. U.S. (4th Cir.), 203 F.2d 948.

It is necessary to show some misconduct on their part before the contention will be considered.

U.S. v. Tacoma (2d Cir.), 176 F.2d 242.

In the *Meredith* case, supra, the Court held, despite the claim of a promise on the part of the defense attorney, that no hearing was necessary because the allegations of the petition were insufficient. In the *Tacoma* case supra the claim on the part of the petitioner there was that counsel had informed him that the United States Attorney would dismiss a pending indictment in return for a plea of guilty to the charge. These cases in no essential particular differ from the one here.

Furthermore, appellant must allege in a proceeding such as this that he is not guilty of the charge since there is no need for setting aside a plea, the truth of which is not contested. Appellant makes no allegations with respect to the facts surrounding his

case. He inferentially admits his guilt to the first count of the indictment, and only makes a bald claim of innocence, without further comment, with respect to the second count of the indictment. However, as appears from our affidavit, when appellant testified in a related case on August 20, 1953 he stated in response to questions about the instant conviction, "I pleaded guilty. I was guilty, and I pleaded guilty." As has been mentioned above, the second count of the indictment concerns the concealment of the very narcotics which appellant inferentially admits he sold. No Court could be satisfied from the record made here that there is a fair chance that appellant is not guilty of the offense to which he had pleaded. There must be something in the record or in the allegations which indicate innocence before a Court will set aside a formal judgment of conviction on collateral attack.

Appellant has not met the conditions precedent to setting aside his plea of guilty. He has directly alleged neither prejudicial misconduct on the part of the Court, nor on the part of the government. Furthermore, since his claim goes only to the length of his sentence, rather than the understanding of the nature of his plea, he does not, as has been stated previously, even have a claim which, if true, would justify setting aside his conviction.

III. APPELLANT'S APPLICATION IS NOT TIMELY.

Appellant was convicted in August of 1951, six years ago. He now for the first time claims he was defrauded. Immediately prior to his plea and sentence government's counsel, in his presence, asked for the maximum sentence which could be imposed by law, and stated that he had informed counsel for the defense that such a recommendation was to be made. Appellant's counsel, in his presence, admitted that he had been informed by the government that they would recommend the maximum penalty. Appellant made no objection, and expressed no surprise at these statements on the part of his counsel, and the Assistant United States Attorney. His only action was to plead guilty to the charges. He made no objection to the sentence at the time it was imposed, and he made no motion to modify sentence within the 60 days allowed by the rules. In fact, when a motion for modification was made at the expiration of his first sentence the claim made here was not urged.

In *Young v. U.S.* (8th Cir.), 228 F.2d 693, the petitioner asserted that he had been fraudulently "induced by government counsel to enter a plea." The Court there held that since he did not claim any breach of an agreement at the time, although the United States Attorney had asked for the maximum sentence, no hearing on his contentions pursuant to Section 2255 could be given.

In *Crowe v. U.S.* (4th Cir.), 175 F.2d 799, it was alleged that the defendant had been tricked by the Federal Bureau of Investigation, the United States

Attorney, and defense counsel into a plea of guilty. The Court there held that since the contentions could have been raised at the time of sentence no hearing need be given under Section 2255. *United States v. Lowe* (2d Cir.), 173 F.2d 346 hold to the same effect. It was alleged there that a bargain had been made to induce a plea of guilty. The remark made by the Court in *Bloombaum v. U.S.* (4th Cir.), 211 F.2d 944 is apropos here, "If he had any defense to the charge he should have presented it at the time."

IV. APPELLANT'S CLAIM IS WITHOUT MERIT.

The circumstances surrounding appellant's allegations give a strong indication of perjury. Appellant made no claim at the time of sentence, at the time of motion for modification, or indeed at any time until now, some six years after the event. At the time of plea and sentence both his own counsel and government's counsel stated in open Court that the government intended to recommend the maximum sentence. The Assistant United States Attorney handling the case actually asked for the maximum sentence. Appellant, although present and presumably articulate, made absolutely no protestations. Although he makes some suggestion of his innocence now, nevertheless at the time he was a witness in another case he cheerfully admitted his guilt to the charge. The allegations themselves, with their suggestion of strange exotic countries, and three months sentences for a thrice

convicted dope peddler, are so improbable as to approach the fantastic.

We strongly urge to the Court that Section 2255 of Title 28 United States Code was not enacted as a ticket for transportation out of prison for prisoners with groundless and possibly perjurious claims. As was stated in *Carvell v. U.S.* (4th Cir.), 173 F.2d 348, it would destroy prison discipline to put the election of travel in the hands of prisoners serving a sentence.

CONCLUSION.

The motion, files and records in this case conclusively showed that appellant was entitled to no relief. Judge Goodman properly denied the petition. The judgment below should be affirmed.

Dated, San Francisco, California,
February 6, 1958.

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

Attorneys for Appellee.

No. 15,780

IN THE
United States Court of Appeals
For the Ninth Circuit

JAMES A. WILLIAMS,

Appellant,

vs.

C. P. COUGHLAN, TED McROBERTS, OTHEAL
WAITLAND, LA DESSA NORDALE, T. N.
GORE, and R. J. McNEALY,

Appellees.

On Appeal from the District Court of the United States for the
District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

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FILED

DEC 27 1957

PAUL P. GIBBEN, CLERK

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Appellees.

**On Appeal from the District Court of the United States for the
District of Alaska, Fourth Judicial Division.**

BRIEF FOR APPELLEE.

JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

STATEMENT OF THE CASE.

On October 15, 1956, James A. Williams, appellant, filed a complaint, civil number 9165, in the District

Court for the District of Alaska, Fourth Judicial Division. Appellant alleged in this complaint, "That defendant, Ted McRoberts, while acting in the capacity of U. S. Marshal in the above district on or about the 7th day of July, 1953 did then and there being did unlawfully and without a search or seizure warrant, seize and carry all of the plaintiff's stock and bar equipment from the plaintiff's business known as the Monte Carlo Club which was located at 1401 Turner Street, Fairbanks, Alaska. Said defendant Ted McRoberts had refused to account for the above stock and equipment.'" He further prayed for judgment against the defendant McRoberts in the sum of ten thousand dollars.

C. P. Coughlan was never served with process. This Court dismissed the action as to McNealy, see *Williams v. Coughlin, et al.*, 244 F. 2d 6 (9th Cir. 1957); Waitland filed an answer. On October 23, 1956, McRoberts filed a motion to dismiss the action on the grounds that Williams was confined in the penitentiary and was without capacity to sue. This motion was still pending when another motion to dismiss was filed by the United States Attorney, who represented McRoberts in his official capacity as acting United States Marshal and La Dessa Nordale, as United States Commissioner. That the statute of limitations had run at the time suit was filed and McRoberts was not subject to suit for acts committed within the scope of his authority as United States Marshal were the two grounds for the motion to dismiss. On October 5, 1957, the order of dismissal of the cause of

action was granted by the district judge upon the authority of the opinion in *Williams v. Coughlan*.

The appellant filed a notice of appeal from this order as to the defendant, McRoberts. However, he did not apply to the District Court for leave to proceed in *forma pauperis*, but designated the previous order which was granted in the former case, *Williams v. Coughlan*, 244 F. 2d 6 (9th Cir. 1957) No. 15,405.

QUESTIONS PRESENTED.

Whether this appeal should be dismissed for failure of the appellant to proceed in accordance with 28 U.S.C.A. 1915(a) and (b).

Whether the action should not be dismissed by this Court upon the grounds that a United States Marshal is immune from civil liability when acting within the scope of his authority.

ARGUMENT.

I.

THE APPEAL SHOULD BE DISMISSED FOR FAILURE OF THE APPELLANT TO APPLY FOR LEAVE TO APPEAL IN FORMA PAUPERIS.

Appellant filed his notice of appeal, but failed to apply to the Court for leave to proceed in *forma pauperis* as required by 28 U.S.C.A. 1915(a) and (b). The leave to proceed in *forma pauperis* which was sent to this Court was granted in *Williams v. Cough-*

lan, No. 15405, such leave was not granted in the present appeal. This appeal should be dismissed for non-compliance with the above statute.

II.

THE ACTION AS TO McROBERTS SHOULD BE DISMISSED BECAUSE HE WAS ACTING WITHIN THE SCOPE OF HIS AUTHORITY AND IMMUNE FROM CIVIL LIABILITY.

The appellant alleged that the appellee McRoberts, while acting in the capacity of United States Marshal seized certain liquor at the Monte Carlo Club and he has been damaged in the sum of ten thousand dollars from the unlawful seizure. The affidavit of McRoberts, which was submitted to the District Court accompanying the motion to dismiss also supports the fact that the appellee was acting within his scope of authority.

The appellee went to the Monte Carlo Club to serve a warrant on the appellant for selling liquor without a license and incident to this arrest seized certain open bottles of liquor and glasses, which were setting in front of customers at the club. The authorities are unanimous in holding that a United States Marshal is not liable for acts committed within the scope of his authority. *Swanson v. Willis*, 220 F. 2d 440 (9th Cir. 1955), 114 F. Supp. 434; *Cooper v. O'Connor*, 99 F. 2d 135 (D.C. Cir. 1938), cert. den. 305 U.S. 643 (1938); *Allen v. U. S.*, 154 F. 2d 329 (D.C. Cir. 1946); *Phelps v. Dawson*, 97 F. 2d 339 (8th Cir. 1938); *Taylor v. Glotfelty*, 201 F. 2d 51 (6th Cir. 1952); *Bell*

v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947). The action should be dismissed for failure to state a claim.

CONCLUSION.

For the reasons stated, the appellee respectfully submits that the appeal should be dismissed or the cause of action dismissed.

Dated, Fairbanks, Alaska,
December 13, 1957.

Respectfully submitted,
GEORGE M. YEAGER,
United States Attorney,
Attorney for Appellee.

(Appendix Follows.)

Appendix.

Appendix

28 U.S.C.A. § 1915(a) and (b). *Proceedings in forma pauperis*.

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of furnishing a stenographic transcript and printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

No. 15784

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

ELMER ETHRIDGE,

Appellant,

VS.

UNITED STATES OF AMERICA

Appellee.

*Appeal from a Judgment of the United States
District Court for the Eastern District
of Washington, Northern Division*

BRIEF FOR APPELLEE

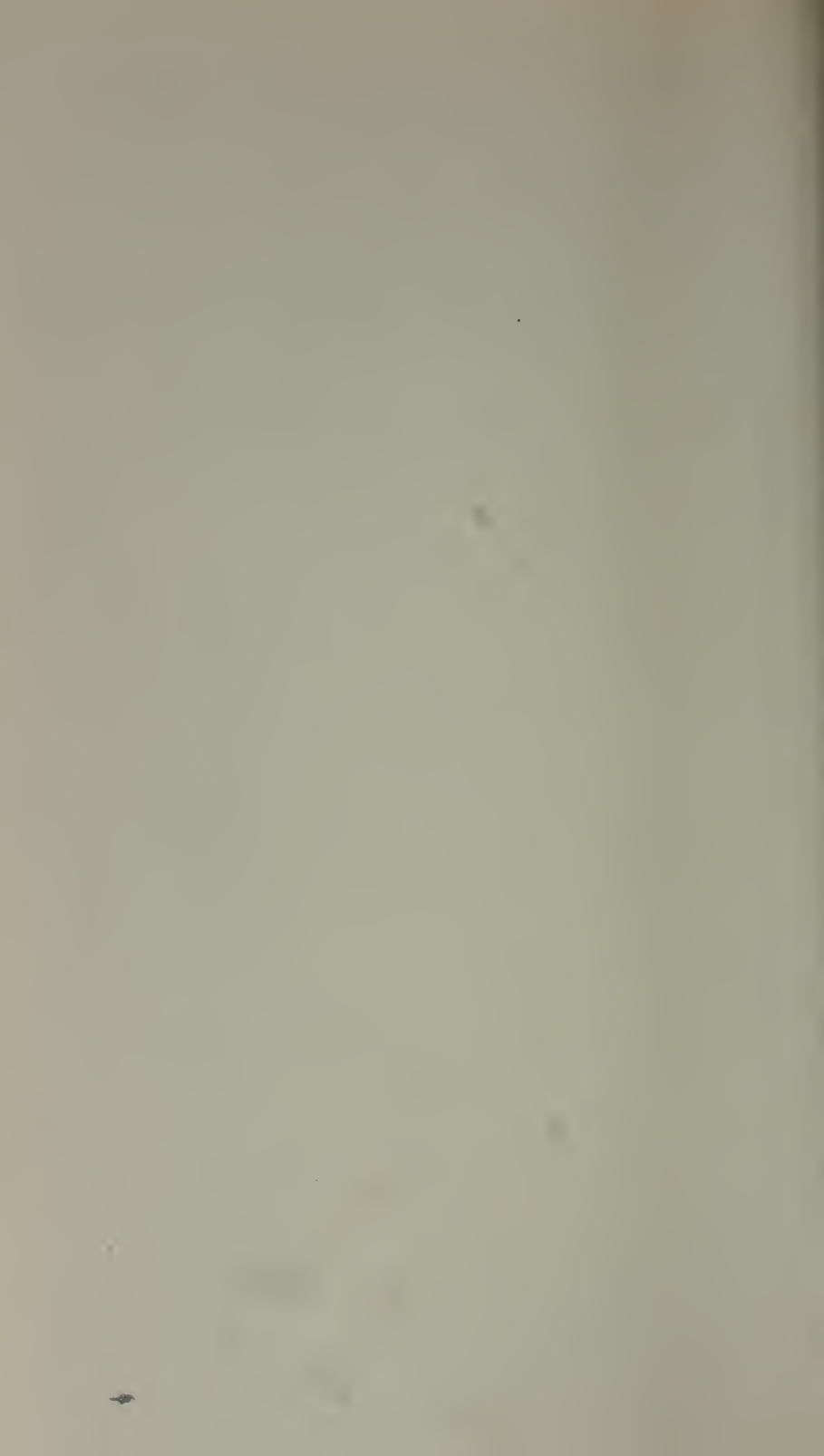
WILLIAM B. BANTZ,
United States Attorney.

RINER E. DEGLOW,
Assistant United States Attorney.

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IN THE
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ELMER ETHRIDGE,
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UNITED STATES OF AMERICA

Appellee.

*Appeal from a Judgment of the United States
District Court for the Eastern District
of Washington, Northern Division*

BRIEF FOR APPELLEE

JURISDICTION

The statement of jurisdiction as set forth in the appellant's brief, with reference to the statutes therein indicated, is accepted as accurate.

STATUTE INVOLVED

Appellant was indicted and convicted for a violation of the provisions of the Obstruction of Justice Statute, 18 U.S.C.A., Sec. 1503:

“Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice,* shall be fined not more than

\$5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769."

(~~Itaies~~ supplied).
~~Itaies~~

ADDITIONAL STATEMENT OF FACTS

An additional statement of the basic facts of this case will be summarized in order to clarify the questions involved in this appeal.

ADDITIONAL STATEMENT OF CASE

Defendant, Elmer Ethridge, was tried and convicted for a violation of Section 1503 of Title 18, U.S.C.A. He was charged with corruptly endeavoring to impede the due administration of justice. The offense is succinctly set out in the indictment which was returned in this case as follows:

"The Grand Jury charges:

That on or about the 13th day of July, 1956 at Sunnyside, in the Southern Division of the Eastern District of Washington and within the jurisdiction of this court, ELMER ETHRIDGE did corruptly endeavor to impede the due administration of justice; that is to say, on or about the date aforementioned, the said ELMER ETHRIDGE, at Sunnyside, Washington, did agree and promise to Harry C. Walters that for the sum of \$1,000.00, he ELMER ETHRIDGE, could and would see that Harry C. Walters could get probation and would not serve one day of his sentence for the conviction of income tax evasion as he, ELMER ETHRIDGE, could and would

use the \$1,000.00 to make the necessary arrangements with the proper authorities to see that he, Harry C. Walters, could get probation and would not serve one day of his sentence for the conviction of income tax evasion, the said Harry C. Walters being convicted defendant under Indictment No. C-4514, Southern Division, Eastern District of Washington, and ELMER ETHRIDGE did by these acts, conversations and means corruptly endeavor to impede the due administration of justice, all in violation of Sec. 1503, Title 18, U.S.C.A." (R. 22)

During the year 1956 Harry C. Walters was a Sunnyside, Washington pharmacist. He had been indicted by the Grand Jury of the United States District Court for the Eastern District of Washington on a charge of Federal income tax evasion. Walters was tried on this charge at Yakima, Washington during June, 1956. (R. 30) The jury found Walters guilty of income tax evasion on four counts (R. 31) He was then sentenced by the Court for a term of imprisonment and filed an appeal, which was later dismissed. (R. 31) Mr. Walters posted bail and returned to his home town of Sunnyside, Washington where he continued to work in his pharmacy business. (R. 31) His pharmacy business had been established over a period of some years at Sunnyside, Washington.

On Friday afternoon, July 13, 1956, defendant contacted Walters in Walters' store and had a two-hour conversation with him in the back room of the store.

(R. 32, 33, 36) He informed Walters that he was on an errand to help Walters. He had been sent to Walters by the United States Attorney for the Eastern District of Washington, William B. Bantz, and William Tugman, an Assistant United States Attorney. (R. 34-35) There was a way out for Walters in which Walters would not have to serve a day of his sentence, but it would cost Walters some money. (R. 34) It would cost \$1000. (R. 35)

Bantz was the United States Attorney for the Eastern District of Washington. Tugman was his Assistant who participated in the trial of United States v. Walters. (R. 81, 82, 83, 94, 95)

The \$1000. would be divided up among the men (Bantz and Tugman) who had put Walters in the predicament that he was in. (R. 36)

Ethridge agreed to guarantee results and if Walters would pay to him the \$1000., Walters would never serve a day of his sentence. (R. 36)

Ethridge introduced himself as Wilson and as being from Yakima, Wenatchee and Spokane. (R. 39, 40, 46) He had just returned from the Truman's aides tax trials in St. Louis, Missouri. (R. 140, 143) He discussed in great detail Walters' tax trial and life at the Federal penitentiary.

Walters promised to pay the defendant the \$1000. on the next afternoon. No money was ever paid.

Walters then had a customer in his store, Mr. Harry Nimsic, follow Ethridge and take down his automobile license number (R. 71) The license number was traced down to Ethridge. (R 90)

Defendant was identified by Walters (R. 41), Nimsic (R. 74), and Mrs. Walters (R. 65) as the individual conversing with Walters in his back room of July 13, 1956. Walters never saw Ethridge again until the present trial.

In March and April, 1956 at Seattle, Washington the defendant Ethridge participated in a similar transaction with the former Sheriff of King County, Harlan S. Callahan.

Callahan was also a convicted defendant on Federal income tax evasion charges. He had been tried and convicted on three counts of tax evasion and was out on bond, awaiting his sentencing, at Seattle, Washington. (R. 166)

Ethridge contacted Callahan on four occasions and made the same offer as he later did to Walters in July of 1956. This time the amount to be paid was \$3,000. (R. 168) All of this sum was to go to a friend of Ethridge, the Assistant United States Attorney

for the Western District of Washington, who had tried Callahan. Callahan would be given a suspended sentence after payment. (R. 168)

Ethridge introduced himself to Callahan as a Mr. White from Wenatchee, Washington. (R. 168)

Callahan indentified Ethridge as the man he knew, named White. (R. 170)

On his last contact with Callahan, Ethridge went to the United States Court House in Seattle, Washington, met Callahan in the corridor outside the court room where Callahan was to be sentenced, and a few minutes before the sentencing offered to set up their deal for \$300. (R. 175, 176)

Callahan refused. (R. 176)

Ethridge was surveilled on three of the meetings with Callahan by agents of the Internal Revenue Service and Federal Bureau of Investigation. (R. 156, 167, 158, 160, 161)

Ethridge never approached or contacted any government employee in the Callahan or Walters transactions. Ethridge never attempted to bribe or influence the official actions of any government personage in either of the two tax causes.

Ethridge's actions and contacts were limited to convicted defendants, Callahan and Walters.

ARGUMENT

I

ACTS OF APPELLANT CONSTITUTED AN ENDEAVOR TO
IMPEDE THE DUE ADMINISTRATION OF JUSTICE.

The principal issue on this appeal is whether the indictment stated a criminal offense within Title 18, U.S.C.A., Sec. 1503. The Court below answered the question, "yes" on three separate occasions. The majority of the argument is ultimately confined to the sufficiency of the indictment and appellant's attack is directed to its sufficiency respecting the conduct of appellant.

At the outset, appellee states:

1. This case does not involve bribery or attempted bribery of a juror, court official, judge or anyone connected with the office of the United States Attorney.

2. It does not involve any contact or communication, direct or indirect, with any such individual.

3. It does not involve any effort to corrupt any of the enumerated persons or in any manner to affect their deliberations or actions.

We are not at odds with these contentions.

Ethridge contacted a party litigant to a United States Income Tax Evasion trial, after the jury deliberated and its finding of guilt had been returned, but prior to a complete and final determination of the case in respect to the litigant Walters.

This is an attempted shakedown which never succeeded. Ethridge made a direct effort to get \$1,000. from Walters. Ethridge sought out Walters and set the proposition up. If payment in cash was made to him, he could arrange it with the officials in the office of the United States Attorney for the Eastern District of Washington so that Walters would never have to serve a day of his sentence. (R. 34, 35, 36) He guaranteed results. (R. 36)

His studied effort to obtain the money was corrupt. Ethridge was trying to perpetrate a fraud on Walters for his own financial advantage. He had no right to seek out Walters and broach any deal which might tend to affect the litigant's further conduct or actions as the case had not been completely determined. The due administration of justice in the cause of United States v. Harry C. Walters in the United States District Court at Yakima, Washington had not been consummated. It was continuing. Walters' appeal was pending. The general public was being solicited to sign a petition on his behalf. (R. 54, 58) Walters was represented by counsel and could, if he had believed appellant, terminated all further judicial

efforts in his own behalf. Ethridge assured him in referring to the petitions:

“You could have one thousand more and they wouldn’t do you any good.” (R. 54)

Each and every word, every action, every effort of Ethridge, was an endeavor to impede Walters’ future conduct in his tax case. The entire deal, the setup outlined by Ethridge, was that only he could help Walters now. The impression was left that Ethridge had the inside track with the United States Attorney’s Office and only he could fix Walters up.

Our lawmaking bodies and our courts have long recognized that it is impossible to properly administer justice if any pressure or attempted pressure is allowed to be brought to bear upon either party to a criminal judicial proceeding. The right to a party to present every bit of evidence legally admissible to the court, at each stage of the proceeding, is a guarantee of justice as perfect as man can make it. The court must be fully informed after a verdict has been reached in order to sift through all of the many involved factors before passing sentence. A litigant similarly may appeal a jury’s finding and the court’s sentence or present a petition to the court for a lesser sentence, unfettered by the Government or any third party agency. For this reason every conceivable device has been employed to combat any

corrupt effort to influence or to endeavor to influence or impede a party's action in a judicial cause.

The wisdom of the legislative intent behind Section 1503 of Title 18, U.S.C.A. is clearly evident. The Act is a bulwark between honest and impartial American jurisprudence on the one hand, and untruth, intimidation, and coercion on the other hand, which if undeterred by some strong measure, presents another potent foe to our American system of justice. Congress was no doubt fully cognizant of these factors and influences when it enacted Section 1503. They apparently decided that "an ounce of prevention is worth a pound of cure". The courts hear both parties equally and fairly. This Statute is inherently a deterrent enactment to ensure such a hearing.

The accusatory portions of Section 1503, as it relates to this case, reads as follows:

" . . . or corruptly or by threats of force, or by an threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000. or imprisoned not more than five years, or both." (Emphasis supplied)

The indictment in this cause conforms in almost identical provision with this provision of Section 1503. In this respect, it complies with Rule 7(c) of

the Federal Rules of Criminal procedure, which states in part:

“The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged . . .”

A reading of the indictment with Rule 7(c) in mind answers appellant's question:

“Was the administration of justice endangered by this act?” (Appellant's Brief, page 18)

The courts have consistently held that the sufficiency of a criminal pleading should be determined by practical, as distinguished from purely technical considerations.^① A reading of Section 1503 in view of these authorities evidences a regard for a factual indictment based upon a violation of the statute.

The indictment itself clearly sets forth the acts of appellant in a corrupt endeavor to impede the due administration of justice. If Walters had paid the \$1000. to Ethridge and in reliance upon Ethridge's guarantee of results, dismissed his attorneys, dismissed his appeal and all further judicial proceedings to which he had recourse, failed to co-operate with

^①*Nye v. United States*, 137 F. (2d) 73 (C.A. 4, 1943), cert. den. 320 U.S. 755; *Rosen v. United States*, 161 U.S. 29, 34; *Cochran and Sayre v. United States*, 157 U.S. 286, 290.

the United States Parole Officer, and sat back, it is clear that as to him, full justice would not have been accorded.

Clearly, the administration of justice would have been impeded, actually obstructed, by appellant's acts.

The vice of the present cause is the endeavor to impede, not an actual and successful obstruction, but the endeavor.

The United States Supreme Court has reviewed this Statute, then Section 135 of the Criminal Code of the United States, in considering a similar contention. *United States v. Russell*, 255 U.S. 138 (1921). The indictment charged a corrupt endeavor to influence William D. Russell who was to be called for jury duty as a petit juror on April 3, 1918. Further, it charged the defendant endeavored to ascertain in advance of the voir doir of the juror in court, whether the juror was favorably inclined towards William D. Haywood and others, whose trial was to be held subsequent to April 3, 1918. Further, defendant did endeavor to convey to the juror an offer to pay money in return for the juror favoring acquittal.

No contact was ever made with the juror. Defendant contacted Lucy Russell, the juror's wife, and questioned her outside the presence of her juror husband and made the offer to her.

Defendant in the *Russell* case stated the solicitation of a third person was only a preparation for an endeavor or attempt to influence the juror in his deliberations, but fell short of an actual endeavor to do so. The Court examined Section 135 and held:

“Necessarily, the first impression of the case is that defendant had some purpose in his approach to Lucy Russell and in the proposition he made to her. What was it, and how far did he execute it? Counsel admits that defendant’s purpose was to ‘find out what his (L. C. Russell’s) attitude was towards the defendants’ to be tried. And that this (we are stating the effect of counsel’s contention) was only in preparation of a sinister purpose, that the defendants in the case did not wish to undertake, or, to use the language of the indictment, did not ‘want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal.’ And this, counsel says, ‘only amounted to a solicitation of a third person who did not accept or act in furtherance of such solicitation,’ and ‘could be interpreted only . . . to be *preparation* (italics counsel’s) for an “endeavor” or “attempt” to influence the juror, but falls far short of an actual endeavor to do so.’

“Counsel enters into quite a discussion, with citation of cases, of the distinction between preparation for an attempt and the attempt itself, and charges that there is a wide difference between them.

“We think, however, that neither the contention nor the cases are pertinent to the section under review and upon which the indictment was based.

The word of the section is 'endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. Criminality does not get rid of its evil quality by the precautions it takes against consequences, personal or pecuniary. It is a somewhat novel excuse to urge that Russell's action was not criminal because he was cautious enough to consider its cost and be sure of its success. The section, however, is not directed at success in corrupting a juror but at the 'endeavor' to do so. Experimental approaches to the corruption of a juror are the 'endeavor' of the section. Guilt is incurred by the trial—success may aggravate, it is not a condition of it.

"The indictment charges that defendant knew that William D. Russell was a petit juror in the discharge of his duty as such juror and, therefore, an endeavor to corruptly influence him was within the section, though he was not yet selected or sworn."

United States v. Russell, 255 U.S. 138, 143 (1921).

Experimental approaches to the corruption of Walters, a direct party litigant, and as such a direct participant in the due administration of his case, as concerns justice, would also be within Section 1503, Title 18, U.S.C.A. Success in the endeavor is merely an aggravation of guilt, not a condition of guilt.

Similar to the Russell case is *Hicks v. United States*, 173 Fd. (2d) 570 (C.A. 4, 1949), cert. den.

337 U.S. 945. This was another case in which a defendant endeavored to influence a juror although he never personally contacted the juror.

These cases appear to disarm appellants of their argument that there can only be a successful prosecution when conduct of a defendant directly operates upon the officer or the Court. (Appellant's Brief, Page 18)

The Supreme Court of the United States has shown in the *Russell* case, 255 U.S. 138, 143 that the statutory provision of using "endeavor" and not "attempt", got rid of any technicalities connected with the word "attempt" and:

"... it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent."

United States v. Russell, 255 U.S. 138, 143

This Court, in 1949, recognized the other cases and their reasoning and held that Title 18, U.S.C.A., Sec. 1503, embraces any and all acts of a corrupt nature, the object of which is to impede the due administration of justice. Also, it sets forth the rule followed in the majority of the cases, both State and Federal, that the success of the endeavor is not important; that the Statute is designed to prevent a miscarriage of justice by corrupt methods; and that any corrupt

endeavor to influence, intimidate or impede any party or witness, commissioner, or any grand or petit jury, whether successful or not, constitutes obstruction of justice prohibited by Title 18 U.S.C.A., Sec. 1503.② At Page 887 this Court then stated with approval the following:

“Any corrupt endeavor whatsoever to ‘influence, intimidate, or impede any party or witness, * * * commissioner, or any grand or petit juror,’ etc., whether successful or not, is proscribed by the obstruction of justice statute. *Craig v. United States*, *supra*.

“The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined. The concept of ‘justice’ upon which the foundations of our society rest and which courts and judges are sworn to uphold encompasses not only the right of an accused to a fair trial, but it also calls for punishment if the accused is found guilty. This concept merely recognizes the inherent right of society to protect itself and its innocent members from vicious acts which imperil one of the most vital safeguards of our system of law. It is well to emphasize this wholesome idea as we contemplate the mounting waves of crime.

② *United States v. Russell*, 255 U.S. 138 at page 143; *Roberts v. United States*, 239 Fd. (2d) 467, 470 (C.A. 9, 1956)

“We agree fully with the statement in *Samples v. United States*, supra, 121 F. 2d at page 265 that: ‘The (obstruction of justice) statute is one of the most important laws ever adopted. It is designed to protect witnesses in Federal courts and also to prevent a miscarriage of Justice by corrupt methods.’ Appellant’s evil acts clearly and properly fall within the interdiction of the statute.”

Catrino v. United States, 176 Fd. (2d) 884, 887, (C.A. 9, 1949)

It is the endeavor, not the corruption which is the gist of the offense. *United States v. Russell* 255, U.S. 138.

This is also shown by a case brought before this court, in which the defendants were charged in Count I of an indictment with conspiracy to commit the obstruction of the due administration of justice in a then pending case. This Court held that the indictment did state an offense. It ruled that the acts set out in the indictment in Count I would constitute an obstruction to the administration of justice. The acts consisted of promises by defendants with one McKeon, that for a large sum of money they would bring about corruptly a dismissal of an indictment against McKeon; and that this would be done by means of political influence, gifts of money and things of value to government officials to do acts in violation of their lawful duty and dismiss the charges without regard to the merits thereof. Although the defendants

did carry out the conspiracy, this case is enlightening for its discussion as to the corrupt and wrongful endeavor which would constitute a violation of the then obstruction of justice statute, Title 18, U.S.C.A., Sec. 241, now with minor changes, Title 18, U.S.C.A., Sec. 1503. *Craig v. United States*, 81 Fed. (2d) 816, 820-821 (C.A. 9, 1936), cert. den. 298 U.S. 690.

The reasoning behind these cases shows that Section 1503 was enacted to cope with the known ingenuity of the criminal mind, not by promulgation of a series of set, prohibited acts, but by broad language contained in the latter section of 1503, of proscribed corrupt conduct.

Justice is being administered from the commencement of an investigation to the termination of all aspects of litigation. *Bosselman v. United States*, 239 Fed. 82, (C.A. 2, 1917) involves alleged violations of the identical section involved in this cause. An investigation was pending by the Grand Jury into activities of defendant Bosselman. No criminal case was under way. (A proposal was made to persons, who would not necessarily be witnesses if a trial occurred, to alter certain books and records.) Defendant was convicted of a violation of this section, then 135 of the Criminal Code of the United States.

The Court held that an attempt by one whose conduct was being investigated by the grand jury to

cause his employees to alter entries in his books, was corrupt and was an endeavor to impede and obstruct the due administration of justice. *United States v. Bosselman*, 239 Fed. 82, 86 (C.A. 2, 1917). Another recent and similar case is *United States v. Martin Solow*, 138 F. Supp. 812 (D.C.N.Y., 1956), involving destruction of letters prior to the issuance of a subpoena duces tecum by an investigating grand jury.

These cases point up when due administration of justice commences; that is, when an investigation is underway by a grand jury, but prior to the return of a criminal indictment. There is no necessity of a trial being in progress or contact with the Court or a judicial officer. It is the corruptness, the essay to fetter, the endeavor to balk or impede the workings of justice, which spell out the crime. Clearly, if Ethridge had endeavored to procure the United States Probation Officer to falsify his report to the Court on Walters, even though the trial of Walters was terminated, Section 1503 would apply. Similarly, if the United States Attorney had been approached at that time or the Court contacted by Ethridge, Section 1503 would apply. *United States v. Polakoff*, 121 Fd. (2d) 333, 334 (C.A. 2, 1941), cert. denied 314 U.S. 626. As to the case being on appeal, if Ethridge had contacted the United States Attorney writing the brief in answer to Walters' brief, had one been written, in an endeavor to "take it easy" or fail to file

it, the due administration of justice would have also been obstructed. Lastly, if communication, blackmail, corrupt influence or coercion was brought to bear on the Court of Appeals, prior to or subsequent to hearing Walters' appeal, had it gotten that far, Section 1503 would apply.

Was an endeavor made to impede the due administration of justice, so as to violate Section 1503, Title 18, U.S.C.A.?

The theory and reasoning of the cases cited heretofor and the case of *United States v. McLeod*, 119 Fed. 416 (D.C.ALA., 1902) which denied the applicability of the obstruction of justice statute then in effect, Section 5399 of the Revised Statutes, United States Compiled Statutes, 1901 at Page 3656, answers the question in the affirmative:

“Justice is administered, in the sense of this statute, only by bringing rights or wrongs, and the persons or things concerned in them, before a judicial tribunal, and there dealing with each particular cases as it arises. Every instrumentality or power, the exercise of which is proper or necessary to the accomplishment of any of these ends, is part and parcel of ‘the due administration of justice.’ Every unlawful act, specified in the statute, which interferes with or obstructs the normal and proper operation of any of the instrumentalities or powers which the law provides for bringing a matter before a judicial tribunal, deciding it after it is there, and enforcing the judgment rendered, constitutes, as to such

matter, either an impediment or an obstruction, or an endeavor to obstruct or impede, 'the due administration of justice,' within the meaning of the statute.

" . . . Justice can be obstructed or influenced only by obstructing or impeding those who seek justice in a court, or those who have duties or powers in administering justice 'therein'."

United States v. McLeod, 119 Fed. 416, 418 (D.C.ALA., 1902)

There must be a pending proceeding in the Federal courts at the time of the action and in Walters' case, there was very definitely a pending cause, his appeal. Ethridge's shakedown was in relation to a pending proceeding. *United States v. Perlstein*, 126 Fd. (2d) 789, 794 (C.A. 3, 1942), cert. den. 316 U.S. 678.

An exact precedent appears to be lacking but the decisions under the Statute are illuminating in their unwillingness to limit the Court's protection to a litigant from improper obstructions or obstacles in his search for justice.

The Court clearly has the power to adequately protect itself and to enforce their right of self-preservation, as was stated in the *Sinclair* case:

"We can discover no reason for emasculating the power of courts to protect themselves against this odious thing."

Sinclair v. United States, 279 U.S. 749, 762, 765

In *Sinclair*, the Court was considering the other or contempt section of the original Statute but cited the present section's counterpart as also in point in holding that there was an obstruction of justice in the systematic shadowing of jurors, although unknown to the jurors, and without any approach to any one of them.

Concluding, Ethridge represented himself as working for Bantz and Tugman, of the United States Attorneys office. Actually, he was working for himself. His endeavor to persuade Walters to give him \$1000. cash, upon a guarantee that his was the only way out, was an attempted fraud on Walters. To misrepresent his motives in such an effort was really a fraud, spelling out in singular detail his intent, his motives of corruptness. The ultimate criminal act was when the false persuasion was committed on a party litigant to a then pending Federal proceeding.

United States v. Polakoff, 121 Fd. (2d) 333, 335 (C.A. 2, 1941), cert. den. 314 U.S. 626.

This is another practice which this Statute was designed to prohibit, a prevention of a miscarriage of justice by corrupt methods as has been aptly stated in *Samples v. United States*, 121 Fd. (2d) 263, 266 (C.A. 5, 1941), cert. den. 314 U.S. 662:

“The statute is broad enough to cover any act, committed corruptly, in an endeavor to impede or obstruct the due administration of justice.”

II

NO ERROR IN ADMITTING THE TESTIMONY OF MCCARTHY, KEIL, CALLAHAN AND DION

(a) The admission of the testimony of Callahan was proper. It had a clear bearing on Ethridge's later deal with Walters as to appellant's motive and intent, and showed that the Walters occurrence was not a mistake, or a chance meeting, but part of a common scheme or plan in which Ethridge made his living.

The evidence was not offered to show identity. (R. 124)

An essential element of this offense was the corrupt actions of Ethridge and the intent with which he acted. He was charged with corruptly endeavoring. It had to be shown that he tried to perform this act and did some overt act which tended but fell short of accomplishing it with the intent to accomplish it.

Intent then, was an essential element to be proven in this case. The quoted rule as set forth in *Van Gesner v. United States*, 153 Fed. 46, 55, 56 (C.A. 9, 1907) applies with equal force to the facts of this cause. Quoting *Wood v. United States*, 16 Pet. 341, 10 L.Ed. 987:

‘Where the intent of the party is matter in issue, it has always been deemed allowable as well in criminal as in civil cases to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.’

(b) The evidence was also admissible in showing a unique plan or scheme which is somewhat elaborate and has special distinguishing characteristics and details, much like an individuals signature to a letter. It is different and noteworthy and reflects his mode of operation by a showing of other similar transactions. *Parsons v. United States*, 189 Fd. (2d) 252, 254 (C.A. 5, 1951); *State v. Sedam*, 46 Wn. (2d) 725, 284 P. (2d) 292; *State v. Lew*, 26 Wn. (2d) 394, 174 P. (2d) 291; *State v. Edelstein*, 146 Wash. 221, 237, 238; 262 Pac. 622.

This evidence came within one of the well recognized exceptions to the general rule excluding evidence of other crimes which has been stated as follows:

“Evidence of other crimes may be admitted when it tends to establish a common scheme or plan embracing the commission of a series of crimes so related to each other that proof of one tends to prove the other, and to show the defendant’s guilt of the crime charged. *Subsequent* as well as prior collateral offenses can be put in evidence, and from such system, identity or *intent* can often be shown . . . The time of the collateral

facts is immaterial, provided they are close enough together to indicate that they are a part of the system." (Italics ours.) 1 Wharton's Criminal Evidence (11th ed.) 527, Sec. 352."

The following statement is made in 4 Nichols Applied Evidence 3424, Sec. 2:

"Evidence tending to show the commission of another crime is admissible in a proper case, but the exceptions to the general rule 'are carefully limited and guarded by the courts, and their number should not be increased.' Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish: . . . (2) intent; . . . (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other."

Hall v. United States, 235 Fed. 869, 870 (C.A. 9, 1916) sums up the rule in this regard:

"The intent and disposition with which one does a particular act must be ascertained from his acts and declarations before and at the time; and when a previous act indicates an existing purpose, from which known rules of human conduct may fairly be presumed to continue and control the defendant in the doing of the act in question, it is admissible in evidence. In many cases it is the only way in which criminal intent can be proved; and the evidence is not to be rejected because it might also prove another crime against the defendant. The practical limit to its admission is that it must be sufficiently significant in character, and sufficiently near in point of time, to afford a presumption that the element sought

to be established existed at the time of the commission of the offense charged. The limit is largely in the discretion of the judge.”

(c) The exception to the rule, excluding evidence of other crimes, was adopted for the Federal courts in *Wood v. U. S.* 16 Pet. 341, 359, 360; 10 L.Ed. 987. The rule admitting evidence that an accused had participated in another similar transaction has bearing upon his motive or intent has been repeatedly approved in the federal courts. The case of *United States v. Wall*, 225 Fd. (2d), 905, 907, (C.A. 7, 1955), cert. den. 350 U.S. 935, is directly in point. In that case the defendant promised to use his influence to procure a promotion for a postal employee. The promotions were customarily based on the payment of money to him, and he had an established *plan* in doing business in the selling of his influence. Evidence of other alleged promises and payments of money from other postal employees, to procure promotions, were admitted during the trial and the Circuit Court approved the admission of the evidence on the grounds that it showed his plan of doing business in the selling of his influence. (Italics supplied)

A similarity of the manner in which other complete offenses were committed, being in remarkable conformity to the pattern of other distinct and separate transactions which were involved in a conspiracy charged against the defendant, made all of this type

of evidence admissible. As to the other conspiracy count, the other offenses were corroborative of similar offenses received to prove the conspiracy count, because the *pattern* of those transactions bore a strong resemblance to the pattern of other transactions proved to have taken place in carrying out the conspiracy. We recognize the rule which usually is applicable in a conspiracy case as to allow proof of these other types of offenses. In any event, however, the testimony in this case showed Ethridge's known *pattern* and *similar plan* of business in representing himself as an expert in bribing and using his influence with Assistant United States Attorneys. *United States v. Iacullo*, 226 Fd. (2d) 788, 793 (C.A. 7, 1955). (Italics supplied)

In Walters transaction and in the Callahan occurrence the plan, the pattern and the unique individuality of the scheme is apparent.

Walters Case (July 13, 1956)

1. A convicted Federal tax evader.
2. Walters was sentenced, but out on bond, awaiting an appeal.
3. Ethridge sought out Walters, going under the name of Wilson.

4. He was from Yakima, Wenatchee and Spokane, Washington.

5. He was acting for the men in the office of the United States Attorney, Eastern District of Washington, who had tried and convicted Walters.

6. He talked knowingly of other tax cases.

7. For \$1000. cash Ethridge could guarantee that Walters would never serve one day of his sentence.

8. The money would go to the United States Attorneys Office, inferring the United States Attorneys, as friends of Ethridge, could be bribed. The bribe would affect their public duties in Walters' behalf.

9. He was there to help Walters (R. 34)

Callahan—Seattle, Washington, March-April, 1956

1. A convicted Federal tax evader.

2. Callahan was out on bond, awaiting his sentence.

3. Ethridge sought out Callahan, giving his name as White.

4. He was from Wenatchee, Washington.

5. He was acting for the Assistant United States Attorney, Western District of Washington, John Obenour, who had tried Callahan in his tax case.

6. He talked knowingly of other tax cases.

7. For \$3,000 cash, Ethridge could see that Callahan would get a suspended sentence.

8. The money would go to Obenour. This Assistant United State Attorney could help Callahan get a suspended sentence. The bribe would affect Obenour's public duty in Callahan's behalf.

9. No one else could help Callahan. (R. 167)

The scheme, the siren song of the glib confidence man in both shakedown efforts is remarkably similar and clearly showed his common scheme, plan and mode of operation.

This type of evidence is admissible as an exception to the general rule of exclusion^③, and was properly admitted.

^③*United States v. Wall*, 225 Fd. (2d) 905, 907 (C.A. 7, 1955), cert. den. 350 U.S. 935; *Lindsey v. United States*, 227 Fd. (2d) 113, 117, (C.A. 5, 1955), cert. den. 350 U.S. 1008; *King v. United States*, 144 Fd. (2d) 729, 732 (C.A. 8, 1944), cert. den. 324 U.S. 854; *Weis v. United States*, 122 Fd. (2d) 675, 682 (C.A. 5, 1941); *Neff v. United States*, 105 Fd. (2d) 688, 691 (C.A. 8, 1939); *Grant v. United States*, 268 Fed. 443, 448 (C.A. 6, 1920), cert. den. 256 U.S. 700.

III

NO ERROR COMMITTED BY THE COURT IN GIVING INSTRUCTION NO. 15 AND IN DENYING DEFENDANT'S INSTRUCTIONS.

(a) The trial court fully discharged its duties in protecting appellant's rights. Instruction No. 15 was proper. (R. 320) It was based upon the evidence in this cause and appropriately delimited the effect of the testimony as far as jury considerations were concerned. The court restricted the use of this testimony to the question of intent and whether or not there existed a scheme, plan, system or design. *Lindsey v. United States*, 227 Fd. (2d) 113, 117, 118 (C.A. 5, 1955), cert. denied 350 U.S. 1008.

The record is bare of any alternate request by appellant or a request by him to amplify this charge. In this respect, appellant failed to comply with the requirement of Rule 30, Federal Rules of Criminal Procedure.

IV

COURT DID NOT ERR IN ADMITTING TESTIMONY BY WALTERS CONCERNING APPELLANT'S PRESENCE AT THE LAMAR CAUDLE TRIAL. (Statement of Appellant's Points No. 3)

Appellant has apparently withdrawn his specification of error No. 3. In any event, the boasting by Ethridge to Walters of his experience in fixing

United States Attorneys and his other deals (to Calahan and Walters) was admissible as a part of his overall scheme in each occurrence.^④ *Miller v. United States*, 47 Fd. (2d) 120 sums up the applicable rule.

“In the course of the conversations, during all of this time, he referred to his own connection with other criminal activities. These references are inextricably interwoven with his suggestions to Jack and with his admissions to Jack of his connection with others among the conspirators. The conversations, taken as a whole, were evidence relevant to the proof of the charge. Evidence which is relevant is not rendered inadmissible because it proves, or tends to prove, another distinct offense.”

^④*Parsons v. United States*, 189 F. (2d) 252, 254 (C.A. 5, 1951).

CONCLUSION

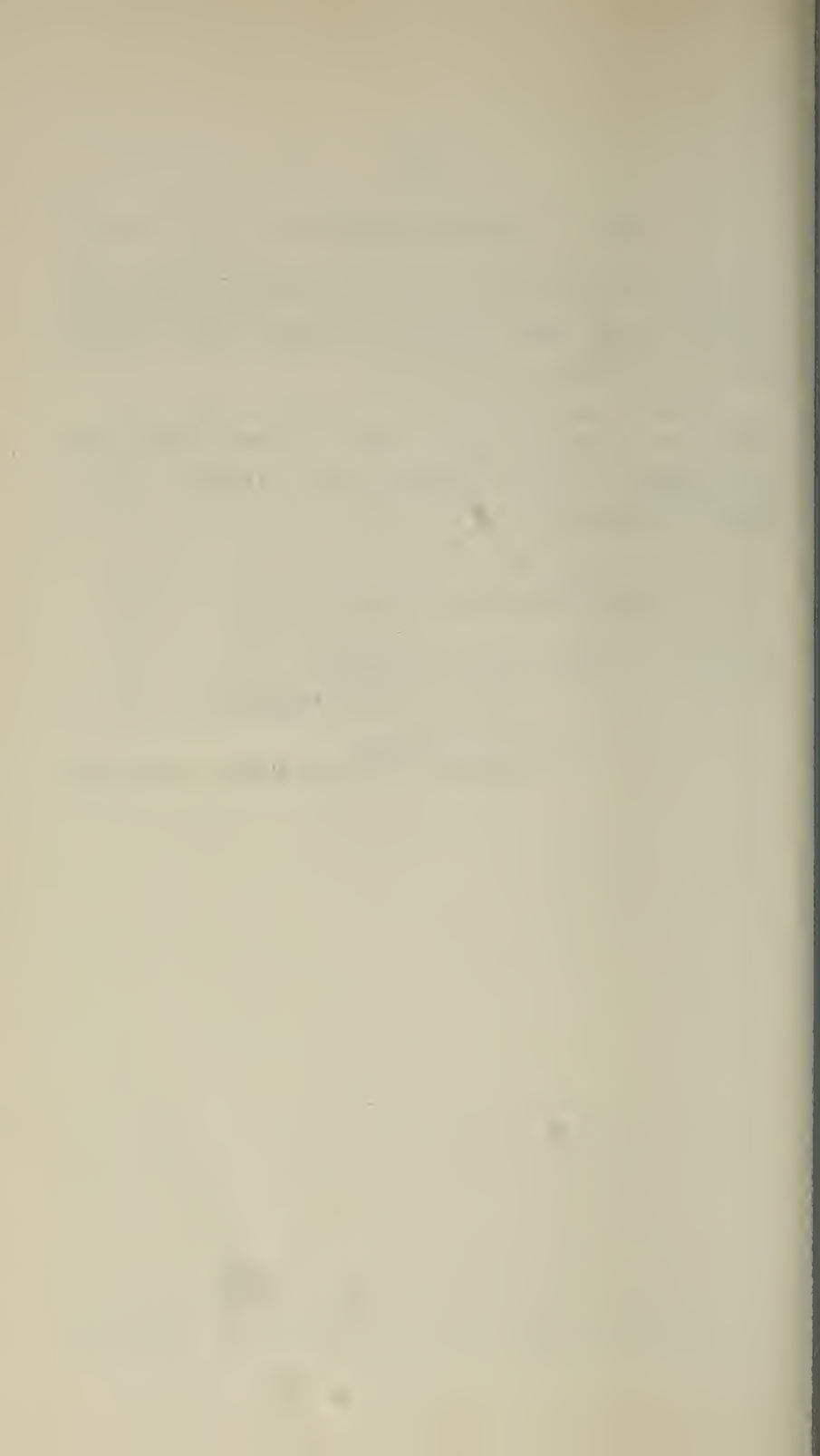
This case presented a factual situation which our Congress must have envisioned when they enacted Section 1503, Title 18, U.S.C.A.

For the reasons set out herein, it is submitted that the Judgment of the United States District Court should be affirmed.

Respectfully submitted,

WILLIAM B. BANTZ,
United States Attorney.

RINER E. DEGLOW,
Assistant United States Attorney.



No. 15787

United States
Court of Appeals
for the Ninth Circuit

UNDERWRITERS SERVICE, INC., a corpora-
tion, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

FEB 18 1958

PAUL P. O'BRIEN, CLERK



No. 15787

United States
Court of Appeals
for the Ninth Circuit

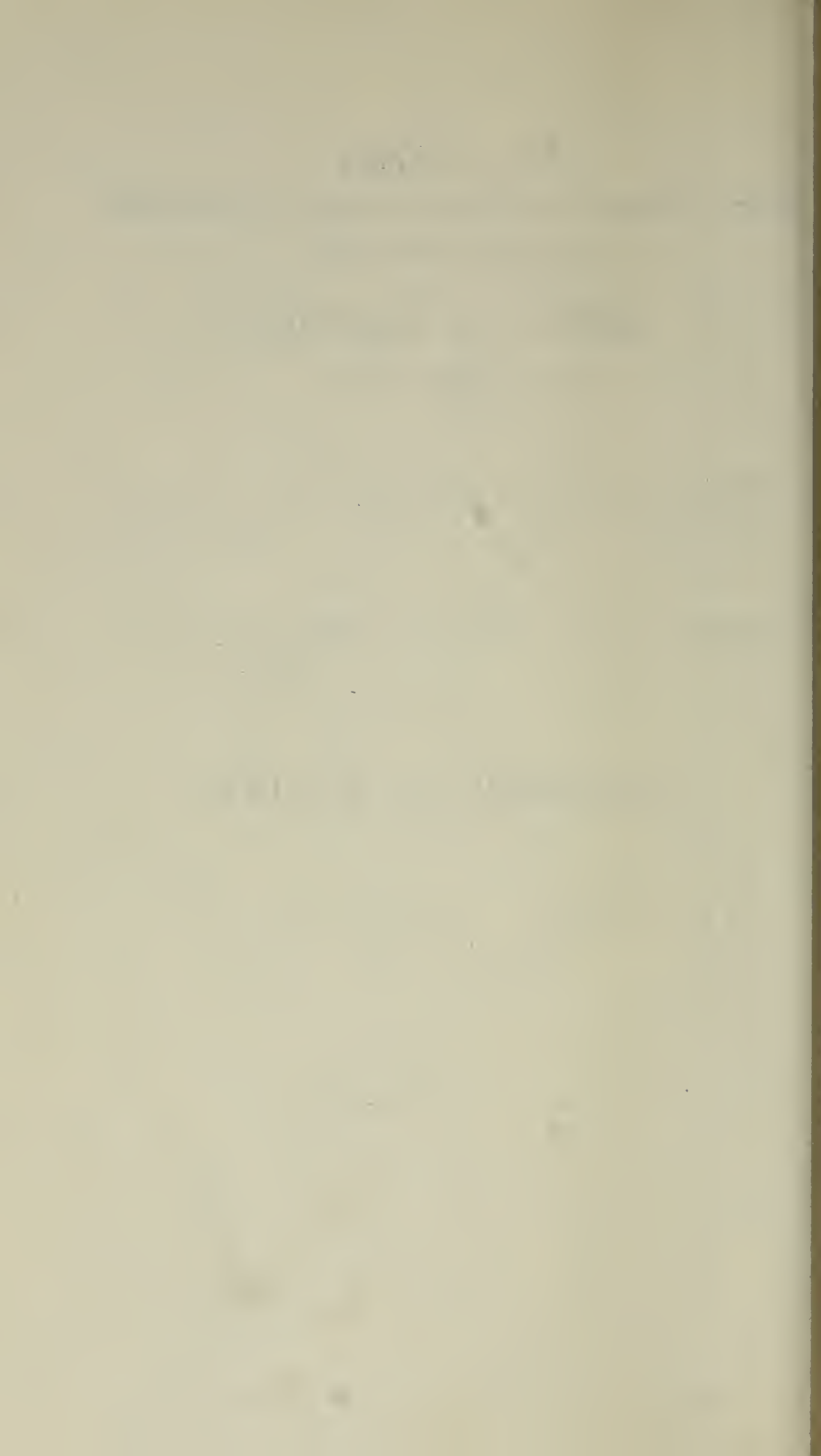
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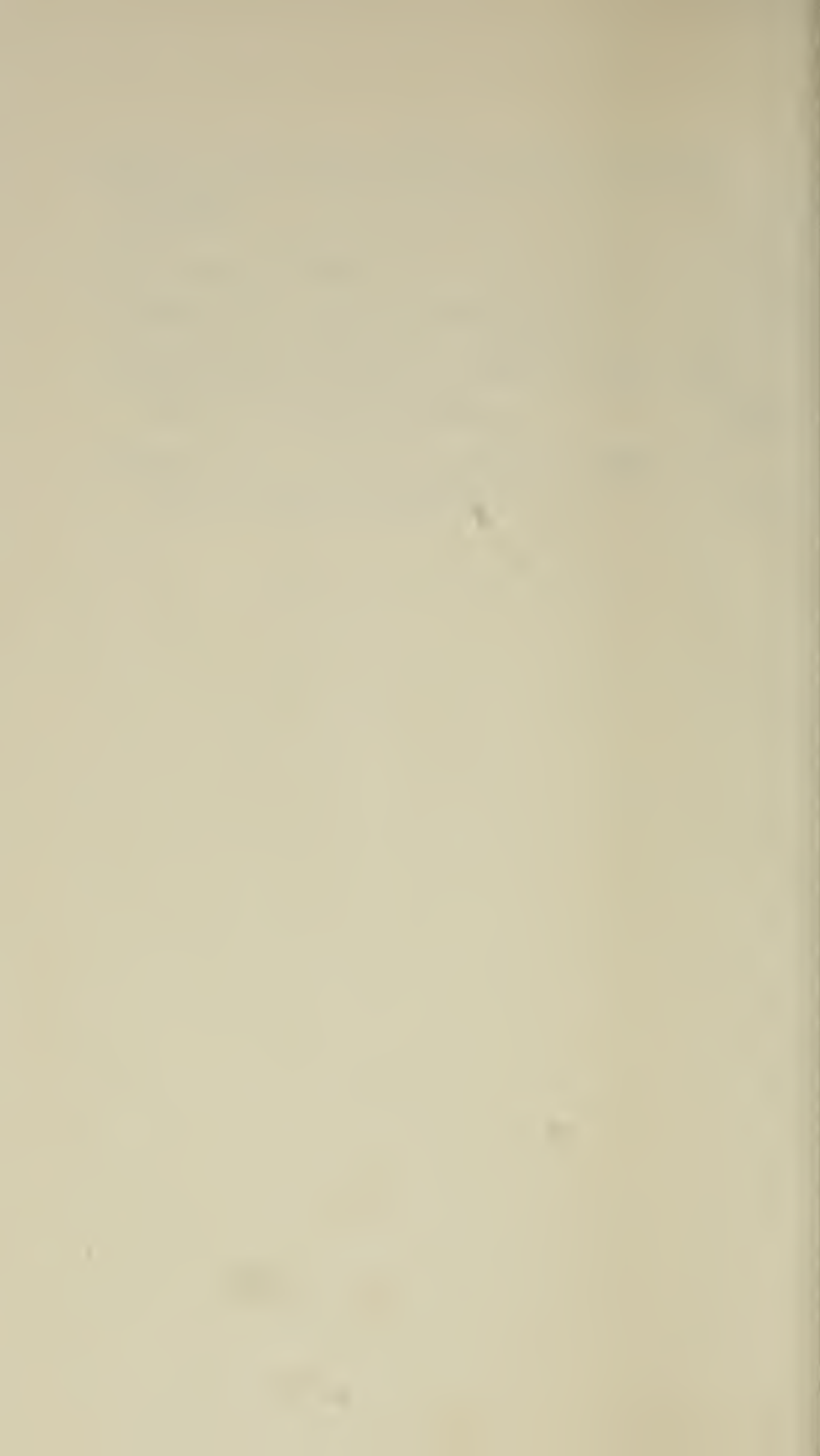
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For Petitioner:

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EDWARD J. RUFF.

For Respondent:

R. C. WHITLEY,
A. S. RESNIK.

Transferred to Judge Murdock, 4/19/57.

The Tax Court of the United States

Docket No. 55706

UNDERWRITERS SERVICE, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1954

Dec. 27—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 28—Copy of petition served on General Counsel.

Dec. 27—Request for circuit hearing in San Francisco, Calif., filed by taxpayer. 1/6/55
Granted.

1955

Jan. 28—Answer filed by General Counsel.

Feb. 1—Copy of answer served on taxpayer—San Francisco, Calif.

1956

May 25—Motion for leave to file amendment to answer, amendment to answer lodged, filed by Respondent. Served 6/29/56.

May 29—Hearing set on Respondent's motion June 27, 1956, Wash., D. C.

Jun. 27—Hearing had before Judge Murdock on Respondent's motion for leave to file amended answer, Ordered—Granted.

Jun. 27—Motion of 5/25/56—Granted.

Jul. 20—Hearing set 8/27/56—San Francisco, Calif.

Aug. 27—Hearing had before Judge Opper on the merits, Stipulation of Facts filed at hearing, with exhibits 1-A thru 3-C attached, and (oral supplemental stipulation) Exhibits 4-D and 5-E, Petitioner's brief due 9/26/56—Respondent's brief due 11/14/56, Replies due 11/29/56.

Sep. 24—Transcript of Hearing 8/27/56 filed.

Sep. 27—Brief filed by Petitioner. 9/28/56 served.

Nov. 14—Respondent's Brief in answer, filed.
11/15/56 served.

Nov. 28—Reply Brief by Petitioner. 11/28/56 served.

1957

May 13—Opinion rendered—Judge Murdock—Decision will be entered in accordance with the Commissioner's determination. Served 5/14/57.

May 17—Decision entered—Judge Murdock—Div. 3. Served 5/20/57.

Aug. 14—Petition for Review by U. S. Court of Appeals, 9th Circuit, with assignments of error filed by Petitioner.

Aug. 14—Affidavit of service by mail of notice of filing petition for review and petition for review, filed.

Aug. 15—Proof of service of petition for review, filed.

Aug. 30—Affidavit of service by mail of notice of filing petition for review and petition for review, filed.

Sep. 3—Proof of service of petition for review, filed.

Sep. 25—Designation of contents of record on review with proof of service filed.

Sep. 25—Affidavit of service by mail of designation, filed.

Oct. 10—Designation of contents of record on review with proof of service thereon, filed.

[Title of Tax Court and Cause.]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Ap:SF:AA:WBH 90-D:HGP) dated September 28, 1954 and as a basis for its proceeding alleges as follows:

I.

The petitioner is a corporation duly organized under the laws of the State of California, with principal office at 369 Pine Street, San Francisco 4, California, having recently moved from the address to which the Commissioner's deficiency notice was mailed. The returns for the calendar years 1950 and 1951 were filed with the Collector of Internal Revenue for the First District of California and the return for the calendar year 1952 was filed with the District Director of Internal Revenue at San Francisco, California.

II.

The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on September 28, 1954.

III.

The deficiencies as determined by the Commissioner are in excess profits taxes for the calendar years 1950, 1951 and 1952 in the amounts of \$1,043.52, \$9,791.02 and \$7,089.25 respectively, or

an aggregate amount for all years of \$17,923.79, all of which is in dispute.

IV.

The determination of tax set forth in the said notice of deficiency is based upon the following error:

In computing the liability for excess profits tax for each of the periods here involved the Commissioner improperly and erroneously determined the excess profits credit based upon income by finding that the aggregate recomputed excess profits tax net income for the 12 consecutive months constituting the calendar year 1946 was \$139,787.76 rather than \$233,722.23. This erroneous finding results from the failure to recognize that petitioner had three taxable years during the calendar year 1946 for the purpose of applying Section 435(d)(1) of the Internal Revenue Code of 1939.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

a. The petitioner is a corporation organized under the laws of the State of California on May 19, 1937.

b. On September 20, 1946, Henry J. Kaiser Company, acquired all of the stock of petitioner, and continued to hold all of such stock until December 18, 1946, on which date Henry J. Kaiser Company sold a substantial portion of stock and thereafter owned less than 95% of the outstanding stock of petitioner.

c. Henry J. Kaiser Company was the common parent of an affiliated group of corporations which filed a consolidated return for the taxable year ended June 30, 1947. Pursuant to a ruling of the Bureau of the Internal Revenue dated April 18, 1947, (a copy of which is attached hereto and marked "Exhibit B") the income of petitioner for the period it was a wholly owned subsidiary of Henry J. Kaiser Company was included in the consolidated return of the affiliated group of corporations of which Henry J. Kaiser Company was the common parent.

d. Pursuant to the direction of the ruling set forth as "Exhibit B", petitioner filed a separate income tax return for the taxable period January 1, 1946 to September 20, 1946, and a separate income tax return for the taxable period December 18, 1946 to December 31, 1946.

e. The excess profits net income for the taxable period January 1, 1946 to September 20, 1946 was \$68,174.60. The excess profits net income for the taxable period September 21, 1946 to December 17, 1946 was \$78,519.90. The excess profits net income for the taxable period December 18, 1946 to December 31, 1946 was a loss in the amount of \$7,131.61.

f. The excess profits net income of petitioner for the months of January, February, March, April, May, June, July and August of 1946 is \$8,521.83 for each month. The excess profits net income of petitioner for the month of September 1946 is \$47,778.28. The excess profits net income of petitioner for the months of October and November

of 1946 is \$39,256.45 for each month. The excess profits net income of petitioner for December 1946 is \$39,256.45.

g. The aggregate excess profits net income of petitioner for the twelve consecutive months in 1946 is \$233,722.23.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that the excess profits net income for each of the twelve consecutive months constituting the calendar year 1946 is as alleged herein and petitioner prays for such other, further and different relief as to this Court may seem meet and proper in the premises.

Dated: December 22, 1954.

/s/ GEORGE E. LINK.

/s/ EDWARD J. RUFF.

Duly Verified.

EXHIBIT "A"

Regional

Appellate Division—San Francisco Region

Room 1010—870 Market Street

San Francisco 2, California

Ap:SF:AA:WBH—90-D:HGP

Sep. 28, 1954

Underwriters Service, Inc.,

114 Sansome Street

San Francisco 4, California

Gentlemen:

You are advised that the determination of your

income and excess profits tax liability for the taxable years ended December 31, 1950, December 31, 1951 and December 31, 1952 disclosed deficiencies in tax aggregating \$17,923.79 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, Room 1010, 870 Market Street, San Francisco 2, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assess-

ment, or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews,
Commissioner.

By /s/ Louis B. Braunagel,
Technical Advisor,
Appellate Division.

Enclosures:

Statement

Form 1276

Agreement Form

STATEMENT

Ap:SF:AA:WBH—90-D:HGP

Underwriters Service, Inc.

114 Sansome Street

San Francisco 4, California

Tax Liability for the Taxable Years Ended December 31, 1950,
December 31, 1951 and December 31, 1952
Income and Excess Profits Tax

Year	Liability	Assessed	Deficiency
1950.....	\$ 65,637.87	\$ 64,594.35	\$ 1,043.52
1951.....	172,321.94	162,530.92	1,791.02
1951.....	172,321.94	162,530.92	1,791.02
Totals.....	<u>\$411,444.17</u>	<u>\$393,520.38</u>	<u>\$17,923.79</u>

In making this determination of your income and excess profits tax liability, careful consideration has been given to your protest filed June 28, 1954 and to the statements made at the conference held on September 3, 1954.

A copy of this letter and statement has been mailed to your

representative, Mr. George E. Link, Attorney, Thelen, Marrin, Johnson & Bridges, 111 Sutter Street, San Francisco 4, California.

Year: 1950

ADJUSTMENT TO NET INCOME

Net income as disclosed by return.....	\$165,110.65
Net income as corrected—no change.....	\$165,110.65

COMPUTATION OF TAX

Net income	\$165,110.65
Combined normal tax and surtax	
42% of \$165,110.65 less \$4,750.00.....	\$ 64,594.47
Alternative tax	\$ 64,594.35
Income tax	\$ 64,594.35
Excess profits tax.....	1,043.52

Income and excess profits tax liability.....	\$ 65,637.87
Income and excess profits tax assessed:	
Original, Account No. 410242	
First California District.....	64,594.35

Deficiency in income and excess profits tax.....	\$ 1,043.52
--	-------------

COMPUTATION OF ALTERNATIVE TAX

Surtax net income.....	\$165,110.65
Less: Excess of net long-term capital gain over short-term capital loss.....	12.50

Surtax net income for purposes of alternative tax.....	\$165,098.15
Partial tax—42% of \$165,098.15 less \$4,750.00.....	\$ 64,591.22
Add: 25% of capital gain, above.....	3.13

Alternative tax	\$ 64,594.35
-----------------------	--------------

Year: 1950

ADJUSTMENTS TO EXCESS PROFITS NET INCOME

Excess profits net income as disclosed by return.....	\$165,098.15
Excess profits net income as corrected—no change.....	\$165,098.15

EXCESS PROFITS CREDIT BASED ON INCOME

In the determination of your excess profits tax liability for the taxable years 1950, 1951 and 1952 you computed the excess profits credit based on income in the amounts of \$182,398.32 (1950),

Year: 1950—(Continued)

Excess Profits Credit Based on Income—(Continued)

\$180,321.94 (1951), and \$179,370.35 (1952). The amount of the credit in each instance was based on an average base period net income of \$213,834.31, in the determination of which, you considered the sum of \$225,200.40 applicable to the recomputed excess profits net income for the base year 1946.

It is held that in the determination of your excess profits tax liability for the taxable years 1950, 1951 and 1952, the excess profits credit based on income is \$158,198.07 (1950), \$156,406.39 (1951), and \$155,739.51 (1952). The amount of the credit in each instance is based on an average base period net income of \$185,363.42, in the determination of which, the amount of \$139,787.76 is considered to be the correct excess profits net income for the base year 1946.

	Calendar Year			
	1946	1947	1948	1949
Normal tax net income ..	\$139,791.09	\$129,859.50	\$201,426.97	\$214,417.80
Capital gains or losses.....	3.33	(30.65)	(58.48)	(399.27)
	<hr/>	<hr/>	<hr/>	<hr/>
	\$139,787.76	\$129,890.15	\$201,485.45	\$214,817.08
Aggregate of three highest years.....				\$556,090.28
Average base period net income.....				\$185,363.42
		1950	1951	1952
85% of \$185,363.42.....		\$157,588.91		
84% of \$185,363.42.....			\$155,705.27	
83% of \$185,363.42.....				\$153,851.64
12% of base period capital addition		639.16	639.16	639.16
12% of net capital addition for taxable year			61.96	1,248.71
		<hr/>	<hr/>	<hr/>
Excess profits credit based on income	\$158,198.07	\$156,406.39	\$155,739.51	
Excess profits credit based on income per taxpayer..	182,398.32	180,321.94	179,370.35	
	<hr/>	<hr/>	<hr/>	
Reduction in credit.....	\$ 24,200.25	\$ 23,915.55	\$ 23,630.84	

Year: 1950—(Continued)

BASE PERIOD CAPITAL ADDITION

	Year Ended 12-31-49	Year Ended 12-31-48	Year Ended 12-31-47
Total assets	\$299,106.92	\$234,209.97	\$181,311.88
Total liabilities	202,720.25	142,762.34	90,658.82
Equity capital.....	\$ 96,386.67	\$ 91,447.63	\$ 90,673.06
75% of borrowed capital....	None	None	None
Adjustment for interest on borrowed capital	None	None	None
Inadmissible assets	None	None	None
75% of loans to members of controlled groups.....	None	None	None
Yearly base period capital..	\$ 96,386.67	\$ 91,447.63	\$ 90,673.06
Excess of Column 1 over Column 2.....			\$ 4,939.04
50% of excess of Column 2 over Column 3.....			387.29
Base period capital addition.....			\$ 5,326.33
12% of base period capital addition.....			\$ 639.16

COMPUTATION OF EXCESS PROFITS TAX

Excess profits net income.....	\$165,098.15
Less: Excess profits credit.....	158,198.07
Adjusted excess profits net income.....	\$ 6,900.08
30% of \$6,900.08.....	\$ 2,070.02
62% of excess profits net income (62% of \$165,098.15).....	\$102,360.85
Less: Total normal tax and surtax on excess profits net income.....	64,591.22
Balance	\$ 37,769.02
Excess profits tax—\$2,070.02 or \$37,769.63 whichever is less.....	\$ 2,070.02
Proration of tax: 184/365 of \$2,070.02.....	\$ 1,043.52

Year 1951

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$278,420.50
Net income as corrected—no change.....	\$278,420.50

Year: 1951—(Continued)

COMPUTATION OF TAX

Net income.....	\$278,420.50
Combined normal tax and surtax, 50¾% of \$278,420.50 less \$5,500.00.....	\$135,798.40
Alternative tax	\$135,761.13
Income tax	\$135,761.13
Excess profits tax.....	36,560.81
<hr/>	
Income and excess profits tax liability.....	\$172,321.94
Income and excess profits tax assessed:	
Original, Account No. 4180136	
First California District.....	162,530.92
<hr/>	
Deficiency in income and excess profits tax.....	\$ 9,791.02

COMPUTATION OF ALTERNATIVE TAX

Surtax net income.....	\$278,420.50
Less: Excess of net long-term capital gain over short-term capital loss.....	144.74
<hr/>	
Surtax net income for purposes of alternative tax.....	\$278,275.76
Partial tax—50¾% of \$278,275.76 less \$5,500.00.....	\$135,724.95
Add: 25% of capital gain.....	36.18
<hr/>	
Alternative tax	\$135,761.13

ADJUSTMENTS TO EXCESS PROFITS NET INCOME

Excess profits net income as disclosed by return.....	\$278,275.76
Excess profits net income as corrected—no change....	\$278,275.76

EXCESS PROFITS CREDIT BASED ON INCOME

An excess profits credit of \$156,406.39 is allowed. See explanation for the year 1950.

COMPUTATION OF EXCESS PROFITS TAX

Excess profits net income.....	\$278,275.76
Excess profits credit.....	156,406.39
<hr/>	
Adjusted excess profits net income.....	\$121,869.37
30% of \$121,869.37.....	\$ 36,560.81
17¼% of \$278,275.76.....	\$ 48,002.57
Excess profits tax	\$ 36,560.81

Year 1952

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$275,723.82
Net income as corrected—no change.....	\$275,723.82

COMPUTATION OF TAX

Net income	\$275,723.82
Combined normal tax and surtax, 52% of \$275,723.82 less \$5,500.00.....	\$137,876.39
Alternative tax	\$137,696.56
Excess profits tax	35,787.80
<hr/>	
Income and excess profits tax liability.....	\$173,484.36
Income and excess profits tax assessed: Original, Account No. CI 322, First California District.....	166,395.11
<hr/>	
Deficiency in income and excess profits tax.....	\$ 7,089.25

COMPUTATION OF ALTERNATIVE TAX

Surtax net income.....	\$275,723.82
Less: Excess of net long-term capital gain over short-term capital loss.....	691.63
<hr/>	
Surtax net income for purposes of alternative tax.....	\$275,032.19
Partial tax—52% of \$275,032.19 less \$5,500.00.....	\$137,516.74
Add: 26% of capital gain.....	179.82
<hr/>	
Alternative tax	\$137,696.56

ADJUSTMENTS TO EXCESS PROFITS NET INCOME

Excess profits net income as disclosed by return.....	\$275,032.19
Excess profits net income as corrected—no change.....	\$275,032.19

EXCESS PROFITS CREDIT BASED ON INCOME

An excess profits credit of \$155,739.51 is allowed. See explanation for the year 1950.

COMPUTATION OF EXCESS PROFITS TAX

Excess profits net income.....	\$275,032.19
Excess profits credit.....	155,739.51
<hr/>	
Adjusted excess profits net income.....	\$119,292.68
30% of \$119,292.68.....	\$ 35,787.80
18% of \$275,032.19.....	\$ 49,505.79
Excess profits tax.....	\$ 35,787.80

EXHIBIT "B"

IT:P:CA
ECH-WTS

Apr. 18, 1947

Underwriters Service, Inc.
1924 Broadway
Oakland, California
Gentlemen:

This office is in receipt of a letter dated April 10, 1947, from the firm of Thelen, Marrin, Johnson & Bridges, 111 Sutter Street, San Francisco, California, dealing in part with the effect of the filing of a consolidated return, under the facts presented, on your established accounting period. Since this office has no record of a power of attorney on file authorizing such firm to represent your corporation in Federal income tax matters, reply is being made to you.

Your corporation which reports its income on the basis of a calendar year became a member of the affiliated group of which Henry J. Kaiser Company is the parent on September 20, 1946, and ceased to be a member of such group on December 18, 1946. The affiliated group of which your company was a member reports its income on the basis of a fiscal year ending June 30 and it is presently contemplated that a consolidated return will be filed for the period ending June 30, 1947. Upon the assumption that consolidated return will be filed, advice is requested whether your company will be required to adopt the fiscal year of Henry J. Kaiser Company or whether you may continue to report

on the basis of a calendar year. If your company is permitted to continue on a calendar year basis, advice is requested whether your company may report its income for the portions of the calendar year 1946 not covered by the consolidated return (that is for the period January 1, 1946, to September 18, 1946, and for the period December 21, 1946, to December 31, 1946) on one separate income tax return.

Section 23.14 of Regulations 104 states that the taxable year of an affiliated group which makes consolidated income tax return shall be the same as the taxable year of the common parent corporation; and upon having elected to file consolidated returns, each subsidiary corporation shall, not later than the close of the first consolidated income tax taxable year ending thereafter, adopt an annual accounting period, fiscal year or calendar year as the case may be, in conformity with that of the common parent.

Upon the basis of the facts presented where your corporation (which is on the calendar year basis) files a consolidated income tax return with the parent corporation and the other members of the affiliated group for the fiscal year of the parent ending June 30, 1947, it is held that your corporation is not required to change its accounting period to conform to that of the parent unless it files or is required to file a consolidated return with such affiliated group for the subsequent taxable year.

With respect to the filing of separate returns for periods not included in the consolidated return, section 23.13(g) of Regulations 104 states that if a corporation, during its taxable year (determined without regard to the affiliation), becomes a member of an affiliated group, its income for the portion of such taxable year not included in the consolidated return of such group must be included in a separate return (or, if a member of another affiliated group which makes a consolidated return for such period, then in such consolidated return). Such section further provides that if a corporation ceases to be a member of the affiliated group during the taxable year of the group, its income for the period after the time when it ceased to be a member of the group must be included in a separate return (or if it becomes a member of another affiliated group which makes a consolidated return for such period, then in such consolidated return).

It is held that the foregoing provisions of the regulations require in the case of the facts presented with respect to your corporation that a separate return be filed for each period during the calendar year 1946 in which your corporation was not a member of the affiliated group. Accordingly, one separate income tax return should be filed for the period January 1, 1946, to September 20, 1946, and another return should be filed for the period December 19, 1946, to December 31, 1946. Each period of less than 12 months for which either a separate or consolidated return is filed, under the provisions

of section 23.13, shall be considered as a taxable year. (Section 23.13(g) of Regulations 104.)

Very truly yours,

/s/ E. I. McLarney,

Deputy Commissioner.

Copy attached.

[Endorsed]: T.C.U.S. December 27, 1954.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

I, II and III.

Admits the allegations contained in paragraphs I, II and III of the petition.

IV.

Denies the allegations of error contained in paragraph IV of the petition.

V.

a. Admits the allegations contained in subparagraph a of paragraph V of the petition.

b, c and d. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs b, c and d of paragraph V of the petition.

V.

e, f and g. Denies the allegations contained in subparagraphs e, f and g of paragraph V of the petition.

VI.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ R. P. HERTZOG,

Acting Chief Counsel,

Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
T. M. Mather, Assistant Regional Counsel, A.
S. Resnik, Special Attorney, San Francisco
Region, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed January 28, 1955.

[Title of Tax Court and Cause.]

AMENDMENT TO ANSWER

Now comes the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, leave having been previously granted, and amends his answer in the said case by eliminating the prayer of the answer and by inserting a paragraph and prayer as herein below set forth to follow paragraph VI of the answer.

VII.

Further answering the petition herein and in the alternative if the Court determines the facts to be as generally set forth in sub-paragraphs (b) to (e), inclusive, of paragraph V of the petition, the respondent alleges as follows:

(a) During period from September 20, 1946 to December 18, 1946 petitioner was a member of a consolidated group and its income for that period was reported by its parent on a consolidated return.

(b) During the aforementioned period and by virtue of such consolidation and such reporting of its income for Federal tax, petitioner had no separate existence within the purview of Section 435 (d)(1) of the Internal Revenue Code of 1939.

(c) For each month during that period, petitioner's income is deemed to be zero.

(d) By a determination that petitioner's income for each month that it had no separate existence is zero, it is to the benefit of petitioner to eliminate in the computation of its excess profits tax credit the twelve months of the year 1946.

(e) Petitioner's average base period net income computed by elimination of the twelve months of 1946 is \$182,064.22 as compared to the amount of \$185,363.42, as determined in the statutory notice.

(f) The reduction in petitioner's average base period net income results in a revision of petitioner's excess profits tax credit based on income for each of the years in issue, as follows:

Credit Per		
Year	Statutory Notice	Revised Credit
1950	\$158,198.07	\$155,393.75
1951	\$156,406.39	\$153,635.06
1952	\$155,739.51	\$153,001.17

(g) Such reduction in credit for each of the years involved causes an increase in deficiency in tax as set forth below and claim for such increased deficiencies for each of the years involved is hereby made:

Year	Increase in Deficiency	Revised Deficiency
1950	\$424.10	\$1,467.62
1951	\$831.40	\$10,622.42
1952	\$821.51	\$7,910.76

Wherefore, it is prayed that:

(1) Respondent's determination be approved and petitioner's appeal be denied; and

(2) In the alternative and as more fully developed herein above; that the Court redetermine the deficiencies herein to be the amounts determined by the respondent in the statutory notice plus increases in the deficiencies for each of the years 1950 to 1952, inclusive, in the respective amounts of \$424.10; \$831.40; and \$821.51; claim for each is hereby made pursuant to the provisions of Section 272(e) of the Internal Revenue Code of 1939.

/s/ JOHN POTTS BARNES,

Chief Counsel,

Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel, T. M. Mather, Assistant Regional Counsel, Aaron S. Resnik, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed June 27, 1956.

[Title of Tax Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective attorneys of record, that the following facts shall be taken as true, and may be considered by The Tax Court of the United States as in evidence, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts here stipulated to be taken as true, and The Tax Court of the United States may enter its findings and decisions herein on this stipulation of facts, exhibits attached hereto, the pleadings herein, and such other evidence of facts not inconsistent herewith, as may be introduced at the hearing of the case:

1. Petitioner is a California corporation duly incorporated on May 19, 1937, with its principal office at 369 Pine Street, San Francisco 4, California. Petitioner filed its Income and Excess Profits Tax Returns for the calendar years 1950 and 1951 with the Collector of Internal Revenue for the First District of California, at San Francisco, California, and for the calendar year 1952 with the Dis-

trict Director of Internal Revenue, at San Francisco, California. Petitioner was formerly Industrial Underwriters, Inc., and its name was changed to its present name on December 30, 1946.

2. Petitioner duly received a statutory notice dated September 28, 1954, advising of deficiencies in its excess profits tax liabilities as follows:

Year	Deficiency
1950	\$1,043.52
1951	9,791.02
1952	7,089.25

A copy of such statutory notice is attached hereto as "Exhibit 1-A".

3. On September 20, 1946, petitioner became a wholly owned subsidiary of Henry J. Kaiser Company and continued to be a wholly owned subsidiary of said Henry J. Kaiser Company until December 18, 1946, on which day Henry J. Kaiser Company ceased to own 95% of the voting stock of petitioner.

4. Henry J. Kaiser Company was the common parent of an affiliated group of corporations which filed a consolidated return for the taxable year of such common parent which ended June 30, 1947. The income of petitioner for the period it was a wholly owned subsidiary of Henry J. Kaiser Company, i.e. September 21, 1946 through December 18, 1946, was included in the consolidated return of the affiliated group of corporations of which Henry J. Kaiser Company was the common parent. The amount of net income of petitioner so included was \$79,012.90. On a separate return basis the net in-

come of petitioner for that period would have been \$78,512.90. However, for consolidated return purposes a deduction of a charitable contribution in the amount of \$500.00 was not properly allowable.

5. Pursuant to a letter of the Bureau of Internal Revenue dated April 18, 1947 (a copy of which is attached hereto and marked "Exhibit 2-B"), in response to a letter from the taxpayer's representative dated April 10, 1947 (a copy of which is attached hereto and marked "Exhibit 3-C"), petitioner filed a separate income tax return for the period January 1, 1946 through September 20, 1946, and a separate income tax return for the period December 19, 1946 through December 31, 1946.

6. Petitioner suffered a net operating loss during the period December 19, 1946 through December 31, 1946 in the amount of \$7,131.61. Petitioner filed a claim for a refund of a portion of the income taxes paid by it for the period January 1, 1946 through September 20, 1946, basing its claim on the carry-back of such net operating loss. The claim was allowed as filed.

7. The excess profits net income for the period January 1, 1946 to September 20, 1946, for which a separate return was filed, was \$68,174.60.

8. The excess profits net income for the period September 21, 1946 to December 18, 1946, the period in which petitioner's income was included in the consolidated return filed by Henry J. Kaiser Company and its affiliated corporations for its taxable year ended June 30, 1947, was \$78,512.90.

9. The excess profits net income for the period

December 19, 1946 to December 31, 1946, for which a separate return was filed, was a loss in the amount of \$7,131.61.

10. Petitioner did not close its books to reflect income for the fractional periods hereinabove referred to. The books were closed for the calendar year 1946 showing a profit of \$139,791.09, which amount was credited to surplus.

Dated: August 27, 1956.

/s/ GEORGE E. LINK,
Attorney for Petitioner.

/s/ JOHN POTTS BARNES, J. M.,
Chief Counsel, Internal Revenue Service, Attorney
for Respondent.

[Note: Exhibit 1-A is the same as Exhibit A set out at pages 9-16. Exhibit 2-B is the same as Exhibit B set out at pages 17-20.]

EXHIBIT "3-C"

[Law Offices of Thelen, Marrin, Johnson & Bridges,
One Eleven Sutter Street, San Francisco 4.]

(Copy)

At: 341 Tower Building, Washington, D. C.,
April 10, 1947.

Honorable Joseph D. Nunan, Jr.
Commissioner of Internal Revenue
Bureau of Internal Revenue Building
Washington 25, D. C.

Attention: Mr. Ferris

Dear Mr. Nunan:

Underwriters Service, Inc., a California corpora-

tion formerly known as Industrial Underwriters, Inc., has outstanding 2000 shares of stock of one class. On September 20, 1946, all of the outstanding stock of that corporation was acquired by Henry J. Kaiser Company, a Nevada corporation, and was held by it until December 18, 1946. On that date Henry J. Kaiser Company sold 1240 shares of the stock and since that time has held the remaining 760 shares.

The Henry J. Kaiser Company is the parent company of an affiliated group for which a consolidated return was filed for the fiscal year ended June 30, 1946. It is presently contemplated that a consolidated return will be made for the period ending June 30, 1947. During the portion of 1946 that it was a wholly owned subsidiary of the Henry J. Kaiser Company its income will be included in the consolidated return of the affiliated group. However, during the periods in 1946 in which the taxpayer was not a wholly owned subsidiary of the Henry J. Kaiser Company its income will be reported on separate returns.

Underwriters Service, Inc. has a calendar year accounting period. That company desires to maintain the calendar year basis and continue to report its income with reference to that period. We are concerned with the question of whether the taxpayer under the circumstances described is required to adopt the fiscal year period of Henry J. Kaiser Company or whether Underwriters Service, Inc. may continue to report its income on the basis of a

calendar year accounting period. If Underwriters Service, Inc. may continue to report its income on the calendar year basis the further question is raised as to whether the taxpayer may report its income for the portion of the calendar year 1946 not covered by the consolidated return on one separate return, i.e. a return showing the income for the period from January 1, 1946 to September 18, 1946 and another return for the period December 21, 1946 to December 31, 1946.

In behalf of Underwriters Service, Inc., we respectfully request a ruling of the Bureau of Internal Revenue on the questions raised herein.

The taxpayer has not yet filed a return for the calendar year 1946. Although the return for that year was due on March 15, 1947, the taxpayer was granted an extension of 60 days within which to file its return for that year. It will take some time to prepare the return after the receipt of the ruling requested herein and accordingly we earnestly solicit your prompt consideration of this matter.

Respectfully submitted,

THELEN, MARRIN, JOHNSON
& BRIDGES,

By GEORGE E. LINK.

GEL:avf

[Endorsed]: T.C.U.S. Filed August 27, 1956.

EXHIBIT "4-D"

Underwriters Service, Inc.

Docket No. 55706

CREDIT BASED ON INCOME

Taxable Periods

Jan. 1, 1946 Sept. 21, 1946 Dec. 18, 1946

to Sept. 20, 1946 to Dec. 18, 1946 to Dec. 31, 1946

Calendar Years

1949

1948

1947

Normal tax net income or loss * \$68,177.93 \$ 78,512.90 \$7,131.61* \$129,859.50 \$201,426.97 \$214,417.80

Net gains or loss* to which section 117(j) is applicable..... 3.33* 30.65 58.48 399.27

Excess profits net income or loss* \$68,174.60 \$ 78,512.90 \$7,131.61* \$129,890.15 \$201,485.45 \$214,817.07

Number of full calendar months in taxable period..... 8 2 0 12 12 12

Monthly average \$ 8,521.83 \$ 39,256.45 \$ 0 \$ 10,824.18 \$ 16,790.45 \$ 17,901.42

Highest 36 months..... 8 4 12 12 12 12

Recomputed excess profits net income \$68,174.60 \$157,025.80 \$201,485.45 \$214,817.07

EXHIBIT "5-E"

Underwriters Service, Inc.

Docket No. 55706

The following schedule represents a mode of computation of excess profits net income for the 12-month period of 1946 submitted by petitioner at a conference in the office of the Internal Revenue Agent, San Francisco.

1 Taxable Year	2		3		4		5		6 Column 4 and Column 5
	Excess profits net income for taxable year	Excess profits net income for each month or part of a month	Number of full months in taxable year	Excess profits net income for each month or part of a month	Number of full and part months in period				
1/ 1/46- 9/20/46.....	\$68,174.60	\$ 8,521.83	8	\$ 8,521.83	9			\$ 76,696.43	
9/21/46-12/18/46.....	78,512.90	39,256.45	2	39,256.45	4			157,025.80	
12/18/46-12/31/46.....	(7,131.61)	(7,131.61)	0	(7,131.61)	1			(7,131.61)	
Proposed total excess profits net income for the 12 months of the year 1946.....								<u>\$226,590.62</u>	

[Endorsed]: T.C.U.S. Filed Aug. 27, 1956.

28 T. C. No. 37

Tax Court of the United States
Underwriters Service, Inc., Petitioner, v. Commis-
sioner of Internal Revenue, Respondent.

Docket No. 55706. Filed May 13, 1957.

OPINION

Excess Profits Tax (Korean War)—Excess Profits Net Income Computation—§435(d)(1).—The petitioner's excess profits net income for the 12 months of 1946 under section 435(d)(1) is the same as its actual excess profits net income for that calendar year and the second sentence of that provision is inapplicable despite the fact that the petitioner was affiliated with Kaiser from September 21 through December 18 in 1946, filed two separate returns for the portions of the year when no affiliation existed and joined in a consolidated return to report its income for the affiliated period.

Statutory Construction. — Statutes must be reasonably construed.

George E. Link, Esq., for the petitioner.

Aaron S. Resnik, Esq., for the respondent.

Murdock, Judge: The Commissioner determined deficiencies in income and excess profits tax as follows:

1950	\$1,043.52
1951	9,791.02
1952	7,089.25

The sole issue is the proper method of computing the petitioner's excess profits net income for its base period year 1946 in order to arrive at its excess credit for the taxable years under the income method.

All of the facts are stipulated and are hereby found as stipulated.

The petitioner, a California corporation, filed its income and excess profits returns for 1950, 1951 and 1952 with the collector or district director of internal revenue at San Francisco, California.

The petitioner became a wholly owned subsidiary of the Henry J. Kaiser Company (hereinafter referred to as Kaiser) on September 20, 1946 and continued as such until December 18, 1946, when Kaiser ceased to own 95 per cent of the voting stock of the petitioner.

Kaiser was the common parent of an affiliated group of corporations which filed a consolidated return for the taxable year of such common parent which ended June 30, 1947. The petitioner's net income of \$79,012.90 for the affiliated period September 21, 1946, through December 18, 1946, was included in that consolidated return. The petitioner's separate net income for that period would have been \$78,512.90 by reason of a \$500 charitable deduction which was not allowable on the consolidated return.

The petitioner, by letter to the Commissioner dated April 10, 1947, asked for a ruling as to the proper method of reporting its income for the portions of 1946 during which it was not a member of

the Kaiser affiliated group. The petitioner stated that it desired to maintain its calendar year basis for reporting income and was concerned as to whether it would be required to adopt the fiscal year period of Kaiser.

The Commissioner replied by letter dated April 18, 1947, that the petitioner would not be required to change its accounting period to conform to that of Kaiser unless it was filing a consolidated return with Kaiser for the next year. The Commissioner also advised that the petitioner would be required to file a separate return for each period during 1946 when it was not a member of the affiliated group. The petitioner filed separate returns for the periods January 1, 1946, to September 20, 1946, and December 19, 1946, to December 31, 1946.

The petitioner's excess profits net income for the periods indicated was as follows:

January 1 to September 20, 1946. . . . \$68,174.60

September 21 to December 18, 1946. . . 78,512.90

(Included in Kaiser's consolidated
return)

December 19 to December 31, 1946. . . (7,131.61)

The petitioner filed and was allowed a claim for refund of a portion of the income taxes paid by it for the January 1 to September 20, 1946, period, based upon a carry-back of the December 19 to December 31, 1946, operating loss of \$7,131.61.

The books of the petitioner were not closed to reflect income for any of those fractional periods.

They were closed only once for the entire year 1946 showing a profit of \$139,791.09, which was credited to surplus.

The \$139,791.09, minus a statutory loss adjustment of \$3.33, or \$139,787.76, was determined by the Commissioner in his notice of deficiency to be the petitioner's excess profits net income for the 12 months of 1946.

The petitioner's excess profits credit for each of the taxable years is to be computed under section 435, which provides that it shall be a percentage of the average base period net income. The base period provided in this case began on January 1, 1946, and ended on December 31, 1949. Section 435(d) provides how the average base period net income shall be determined, and its first sentence is that it shall be determined by computing the excess profits net income for each month of the base period. The petitioner attacks the determination of the Commissioner only as to his determination for the 12 months of 1946. The Commissioner has correctly determined the excess profits net income for those 12 months.

The petitioner's contention is that the second sentence of section 435(d)(1) applies in this case:

* * * The excess profits net income for any month during any part of which the taxpayer was in existence shall be the excess profits net income for the taxable year in which such month falls divided by the number of full cal-

endar months in such year, but in no case shall the excess profits net income for any month be less than zero. * * *

That provision has no application to this case. The petitioner tries to make much of the reference to "taxable year" in the quoted sentence from section 435(d)(1). However, his reliance is misplaced as clearly appears when that sentence is read along with all of the other provisions of section 435. The purpose of that sentence is to give some slight relief in a situation where the taxpayer was in existence for only a part of the beginning month of one of its taxable years, necessarily a period of less than 12 full months, making up a part of the 48-month base period. This taxpayer had no such situation but was in existence both before January 1, 1946, and after December 31, 1949, before and after each separate short tax period, "taxable year", in the calendar year 1946 and during all of every one of the 12 months in the calendar year 1946. There is no occasion to compute its excess profits income for any month in 1946 during a part of which it was in existence and during a part of which it was not in existence, since there was no such month. Cf. *Helvering v. Morgan's, Inc.*, 293 U.S. 121. The fact that the petitioner filed two separate returns for portions of 1946 and that its income for the other portion of that year was reported in the consolidated return had no effect whatsoever upon the petitioner's excess profits net income for any of the 12 months in the calendar year 1946.

The petitioner, by a computation in which it purports to apply the quoted second sentence of section 435(d)(1), divides its excess profits net income for the period from January 1, 1946, through September 20, 1946, by 8 (months) and then multiplies the quotient by 9 (months); divides its excess profits net income for the period September 21, 1946, through December 18, 1946, by 2 (months) and then multiplies by 4 (months); subtracts its loss for the period from December 19, 1946, through December 31, 1946; and arrives at \$226,590.62 as the total excess profits net income for 1946, whereas its actual excess profits net income for the 12 months of 1946 was \$139,787.76. It has by this method expanded the 12 months of 1946 into 14 months and has computed excess profits net income for "taxable years" rather than for months. There is no authority in the law for any such unreasonable computation and no merit to the petitioner's contention in this case. Cf. *Church of the Holy Trinity v. United States*, 143 U.S. 457; *United States v. American Trucking Associations, Inc.*, 310 U.S. 534.

The conclusion that the Commissioner's determination in this case is correct requires rejection of his alternative computation upon which he bases a claim for increased deficiencies.

Decision will be entered in accordance with the Commissioner's determination.

Served and Entered May 14, 1957.

The Tax Court of the United States
Washington

Docket No. 55706

UNDERWRITERS SERVICE, INC.,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed May 13, 1957, it is

Ordered and Decided: That there are deficiencies in income and excess profits tax as follows:

Year	Deficiency
1950	\$1,043.52
1951	9,791.02
1952	7,089.25

Entered May 17, 1957.

/s/ J. S. MURDOCK,
Judge.

Served and Entered May 20, 1957.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 55706

UNDERWRITERS SERVICE, INC., a corpora-
tion, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF A DECISION
OF THE TAX COURT OF THE UNITED
STATES

To the Honorable Judges of the United States
Court of Appeals for the Ninth District:

Underwriters Service, Inc., a California corporation, the Petitioner in this cause, hereby files its petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by The Tax Court of the United States rendered on May 17, 1957, Docket No. 55706, determining deficiencies in petitioner's excess profits taxes for the calendar years 1950, 1951 and 1952, in the amounts of \$1,043.52, \$9,791.02, and \$7,089.25, respectively, for an aggregate amount for all years of \$17,923.79, and respectfully shows:

I.

Jurisdiction and Venue

Petitioner files this petition for review by the

United States Court of Appeals for the Ninth Circuit pursuant to the provisions of section 7481 to section 7483, inclusive, of the Internal Revenue Code of 1954, 26 U.S.C. section 7481 to section 7483 inclusive.

Petitioner, Underwriters Service, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office in San Francisco, California.

Petitioner's returns for the taxable years in question were filed with the Collector of Internal Revenue for the First District of California for the calendar years 1950 and 1951, and with the District Director of Internal Revenue at San Francisco, California, for the calendar year 1952.

II.

Nature of the Controversy

The controversy relates to the computation of Petitioner's excess profits tax credit for the calendar years 1950 through 1952. The single question of substantive tax law raised by this petition for review is whether or not the second sentence of section 435 (d) (1) of the Internal Revenue Code of 1939, 26 U.S.C.A. Excess Profits Tax, section 435 (d) (1), is to be applied in determining the excess profits tax net income of Petitioner for each of the months in the calendar year 1946.

All of the facts were stipulated. The stipulations and the exhibits attached thereto present the following factual situation:

On September 20, 1946, Henry J. Kaiser Company acquired all of the stock of Petitioner, and continued to hold all of such stock until December 18, 1946, on which date Henry J. Kaiser Company sold a substantial portion of stock and thereafter owned less than 95% of the outstanding stock of Petitioner.

The Henry J. Kaiser Company was the common parent of an affiliated group of corporations which filed a consolidated return for the taxable year ending June 30, 1947. Pursuant to a ruling of the Bureau of Internal Revenue, dated April 18, 1947, the income of Petitioner for the period it was a wholly-owned subsidiary of Henry J. Kaiser Company was included in the consolidated return of the affiliated group of corporations of which Henry J. Kaiser Company was the common parent.

Further pursuant to the direction of the ruling above mentioned, Petitioner filed a separate income tax return for the taxable period January 1, 1946, to September 20, 1946, and a separate income tax return for the taxable period December 18, 1946, to December 31, 1946.

The excess profits net income of petitioner for the taxable period January 1, 1946, to September 20, 1946, was \$68,174.60. The excess profits net income of petitioner included in said consolidated return for the taxable period September 21, 1946, to December 17, 1946, was \$78,519.90. The excess profits net income of petitioner for the taxable period December 18, 1946, to December 31, 1946, was a loss in the amount of \$7,131.61.

Petitioner computed its excess profits net income for the period involved by applying the formula contained in the second sentence of said Section 435 (d) (1) of the Internal Revenue Code of 1939, and concluded that its excess profits net income for the months of January, February, March, April, May, June, July and August of 1946 is \$8,521.83 for each month. The excess profits net income for the Petitioner for the month of September 1946 is \$47,778.28. The excess profits net income for Petitioner for the months of October and November of 1946 is \$39,256.45 for each month. The excess profits net income of Petitioner for December 1946 is \$39,256.45. The aggregate excess profits net income of Petitioner for the 12 consecutive months in 1946 is \$226,590.62.

The Commissioner of Internal Revenue, in complete disregard of the formula contained in said section, determined that the actual net profit realized by Petitioner for the calendar year 1946, in the amount of \$139,787.76, was Petitioner's excess profits net income for the 12 months of 1946, computed Petitioner's excess profits tax credit for the taxable years here in question on that basis, and determined the deficiencies in excess profits taxes for the taxable years ending on December 31, 1950, 1951 and 1952, as aforesaid.

III.

Review by the United States Court of Appeals
for the Ninth Circuit

Petitioner being aggrieved by the decision by The

Tax Court of the United States rendered on May 17, 1957, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

IV.

Assignments of Error

Petitioner assigns as error the following acts and omissions of The Tax Court of the United States:

1. The holding that the Commissioner of Internal Revenue has correctly determined the excess profits net income of Petitioner for the 12 months of 1946.

2. The holding that the second sentence of section 435 (d) (1) of the Internal Revenue Code of 1939 has no application to this case.

3. The failure to find and to hold that the second sentence of section 435 (d) (1) of the Internal Revenue Code of 1939 is the statutory formula by which the excess profits net income is computed for each month in the base period during any part of which a taxpayer was in existence, and that such formula was correctly and properly applied by Petitioner to its three taxable years within the calendar year 1946.

4. The failure to find and to hold that Petitioner pursuant to and in accordance with the said second sentence of section 435 (d) (1), correctly computed the excess profit net income for each of the 12 months in its base period in 1946, and properly computed and accounted for the excess profits tax credit in the years 1950 through 1952.

Dated: San Francisco, California, August 9, 1957.

Respectfully submitted,

/s/ GEORGE E. LINK,
Attorney for Petitioner.

Duly Verified.

[Endorsed]: T.C.U.S. Filed Aug. 14, 1957.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 17, inclusive, constitute and are all of the original papers on file in my office as called for the "Designation of Contents of Record on Review", including Exhibits 1-A through 5-E, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 23rd day of October, 1957.

[Seal]

HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15787. United States Court of Appeals for the Ninth Circuit. Underwriters Service, Inc., a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: November 5, 1957.

Docketed: November 15, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15787

UNDERWRITERS SERVICE, INC., a corporation,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

Statement of Points

Petitioner, Underwriters Service, Inc., a corporation, hereby submits a concise statement of the points upon which Petitioner intends to rely in this appeal, as follows:

(1) The Tax Court erred in not concluding as a

matter of law that the Commissioner has incorrectly determined the excess profits net income of Petitioner for the 12 months of 1946.

(2) The Tax Court erred in not concluding as a matter of law that the second sentence of Section 435(d)(1) of the Internal Revenue Code of 1939 is applicable to the facts as stipulated in this case.

(3) The Tax Court erred in not concluding as a matter of law that each of the periods for which a separate or consolidated income tax return was filed returning Petitioner's income for the calendar year 1946 is a taxable year within the definition of the term "taxable year" in section 48(a) of the Internal Revenue Code of 1939, the Respondent's Regulations issued pursuant thereto and Respondent's Rulings pertaining thereto.

(4) The Tax Court erred in not concluding as a matter of law that, according to the clear terms of Section 435(d)(1) of the Internal Revenue Code of 1939, the excess profits tax net income of Petitioner for each month during the calendar year 1946 is arrived at by dividing the excess profits tax net income for each of the taxable years by the number of full calendar months in such period.

(5) The Tax Court erred in not concluding as a matter of law that Petitioner correctly computed its excess profits net income under Section 435(d)(1) of the Internal Revenue Code of 1939 for the 12 months of 1946 in the amount of \$226,590.62.

(6) The Tax Court erred in not concluding as a matter of law that the principles of statutory con-

struction with respect to tax statutes compel it to render a decree in favor of Petitioner and against Respondent.

Designation of Record for Printing

In accordance with the provisions of Rule 17(6) of the Rules of this Court, Petitioner hereby designates the following items for printing in the record on appeal:

1. Docket Entries (Document No. 1)
2. Petition (Document No. 2)
3. Answer (Document No. 3)
4. Amendment to Answer (Document No. 5)
5. Stipulation of Facts with Exhibits 1-A through 3-C attached (Document No. 6)
6. Exhibits 4-D and 5-E admitted on oral Stipulation (Document No. 7)
7. Opinion (Document No. 9)
8. Decision (Document No. 10)
9. Petition for Review (Document No. 11).

Dated: November 21, 1957.

/s/ GEORGE E. LINK,

/s/ CHESTER H. BRANDON,
THELEN, MARRIN, JOHNSON
& BRIDGES.

[Endorsed]: Filed November 22, 1957. Paul P. O'Brien, Clerk.

No. 15,787

In the

United States Court of Appeals

For the Ninth Circuit

UNDERWRITERS SERVICE, INC., a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitioner's Reply Brief

GEORGE E. LINK

CHESTER H. BRANDON

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Attorneys for Petitioner

FILED

MAY 12 1950

PAUL P. O'DRIEN, CLERK

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No. 15,787

In the

United States Court of Appeals

For the Ninth Circuit

UNDERWRITERS SERVICE, INC., a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitioner's Reply Brief

I.

ARGUMENT

A. General Reply to Arguments of Respondent.

In his brief, Respondent, obviously unwilling to meet directly the specific contentions made by Petitioner in its opening brief, tries to overcome their effect indirectly by arguing in general and extremely vague terms that such contentions are (1) contrary to the purpose and intent of Section 435(d) of the Internal Revenue Code of 1939 and (2) that the language of this section does not warrant the construction for which Petitioner contends. Not wishing to repeat the arguments contained in our opening brief, we shall here attempt to simply answer the arguments utilized by Respondent in support of his position to the extent that

certain aspects thereof may not have been specifically covered in our opening brief.

To support his first point, the Respondent, on pages 8 and 9 of his brief, cites and quotes from the House and Senate reports, the substance of which merely discusses in very general terms the Excess Profits Tax Act of 1950. Nowhere can be found in these reports a specific statement with respect to the particular section or sentence of the Internal Revenue Code here involved, nor indications as to the purpose or intent thereof. By what might be termed "bootstrapping", the Respondent, on pages 18 and 19 of his brief, has attached much significance to a statement of The Tax Court that the second sentence of Section 435(d)(1) was intended to take care of the situation where the taxpayer is in existence for only a part of the beginning month of a taxable year. The fallacy of this argument lies in the fact that this statement was arbitrarily and gratuitously made by The Tax Court, without a shred of support and was simply as good a guess as any as to what situation this sentence was meant to apply.

Moreover, even if we are to assume that this is the situation, or one of them, that this sentence was intended to cover, we would have exactly the same result as Respondent now calls "absurd"—specifically, that the excess profits net income of a taxpayer in that situation would be inflated over that of his actual income by attributing to the beginning part month of a taxable year an amount arrived at by dividing the total income for that particular taxable year by the number of full calendar months in such year. It is quite apparent that it would be not at all unusual for a taxpayer to have an excess profits tax net income double that of his actual net income were he within this assumed situation. This result should not be perfectly all right in one case and "absurd" in another.

The Respondent then argues that the plain language (which he then proceeds to ignore) of Section 435(d)(1) does not warrant the construction contended for by Petitioner, apparently for the simple reason that he feels the result is "unreasonable." He talks again in terms of an imagined purpose, an artificially created standard, and, of course, then has no trouble in concluding that the Petitioner's contention is unwarranted. The advantage of this approach, from the Respondent's standpoint, is that he is thus saved the trouble of answering, or meeting, the arguments of Petitioner with respect to the meaning of the term "taxable year" contained in Section 435(d)(1) and the principles of statutory construction applicable to tax statutes.

Respondent, apparently for lack of an answer, makes no attempt to discuss the application of the term "taxable year" to the situation presented here. This essential cannot be dismissed by simply ignoring it.

Respondent does, inferentially, recognize the problem raised by applying the principles of statutory construction, but it is quite interesting that none of the cases cited, and quoted from, on pages 16-17 of his brief concerned tax statutes. The first, *Johnson v. United States*, 163 Fed. 30 (1908), held that a schedule of assets filed in an involuntary bankruptcy proceeding was a pleading within the meaning of a statute prohibiting the introduction of a pleading as evidence to be used against a defendant.

The second, *Federal Deposit Corp. v. Tremaine*, 133 F.2d 827 (2d Cir. 1943), concerned the meaning to be given the term "public money" in a statute permitting a national bank to pledge its assets as security for a deposit of "public money." Finally, the third, *Cabell v. Markham*, 148 F.2d 737 (2d Cir. 1945), simply held, quite correctly, to say the least, that a complaint filed by a creditor under the Trading with the Enemy Act, as re-enacted for World War II, did

not require as a condition to such suit that the debt be owing on October 6, 1917!

It would appear quite academic to conclude that none of these cases relied on by Respondent are applicable to the construction of a tax statute, and most assuredly cannot be taken as overruling or distinguishing the decisions of The Supreme Court of the United States cited by the Petitioner in its opening brief and *all* of which cases were concerned with the construction of tax statutes.

It is appropriate to also point out that Respondent does not attempt to argue that the principles of statutory construction applicable to statutes in general are equally applicable to tax statutes. As he ignores the language of Section 435(d)(1), Respondent also ignores the language of The Supreme Court of the United States with respect to construing tax statutes. An example of such language, which is at this time well worth repeating, is contained in *Crooks v. Harrelson*, 282 U.S. 55, 61 (1930) :

“Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness.”

B. Reply to the Alternative Argument of Respondent with Respect to the Remand of this Case.

The final argument of Respondent is that, if this Court should disagree with the decision of The Tax Court, this case should be remanded for the computation of the excess profits tax credit of Petitioner in a manner which would result in increased deficiencies for the tax years here involved. This argument of Respondent was, of course, rejected by The Tax Court after it sustained the Respondent's deficiency determination.

The basis of Respondent's argument in support of this alternative contention is that Petitioner had no separate existence during the period for which a consolidated return was filed and therefore had only two taxable years during which it had a separate existence, instead of three, during the calendar year 1946. This is a very misleading and erroneous contention, in that, in the first place, the statute is worded in terms of "existence", not "separate existence."

Secondly, "existence", as that term is used in Section 435(d)(1), has no relationship to whether or not consolidated returns are filed. It clearly refers to whether or not a taxpayer is duly incorporated under the laws of some governmental body having authority to create artificial entities. There is no issue as to that fact here.

Finally, Respondent, on page 20 of his brief, makes the completely accurate statement that "a fractional part of a year is a 'Taxable year' only if a return is made for that period." He then draws the completely inaccurate conclusion by saying that, since "no return was filed either by taxpayer or by its parent for the fractional part of the year 1946, taxpayer had—taxwise—no existence for that period." This ignores the fact that, pursuant to the Regulations and the letter, dated April 18, 1947, from Respondent, Petitioner's income for the fractional part of the year during which it was affiliated was returned in its parent's consolidated return and led to Respondent's conclusion in that letter that "each period of less than twelve months for which a separate *or consolidated* return is filed, under the provisions of Section 23.13, shall be considered as a taxable year." (Emphasis added). It is quite anomalous to conclude that a taxpayer has—taxwise—no existence during a period which—taxwise—is one of its three taxable years.

We submit that the sole issue to be decided on this appeal is whether the Petitioner's method of computing its excess profits tax credit is correct or whether The Tax Court was correct in sustaining the Respondent's determination. There is no alternative issue.

II.

CONCLUSION

The Petitioner's position is that the application of the clear language of Section 435(d)(1) to the facts of this case necessarily results in the excess profits tax credit contended for by Petitioner and that the decision of The Tax Court in sustaining the Respondent is incorrect and should be reversed.

Dated: San Francisco, California, May 12, 1958.

Respectfully submitted,

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Attorneys for Petitioner

In the United States Court of Appeals
for the Ninth Circuit

UNDERWRITERS SERVICE, INC., a Corporation,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court
of the United States

BRIEF FOR THE RESPONDENT

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Assistant Attorney General.

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I. HENRY KUTZ,
DAVID O. WALTER,
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FILED

APR 19 1958



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15,787

**UNDERWRITERS SERVICE, INC., a Corporation,
PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the Tax Court
of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 32-37) is reported at 28 T. C. 364.

JURISDICTION

This petition for review (R. 39-44) involves federal income and excess profits taxes for the years 1950, 1951 and 1952. On September 28, 1954, the Commissioner mailed to the taxpayer notice of a deficiency in the total amount of \$17,923.79. (R. 9-11.) Within ninety days thereafter and on December 22, 1954, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency

under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 6-9.) The decision of the Tax Court was entered on May 17, 1957. (R. 38.) The case is brought to this Court by a petition for review filed August 14, 1957. (R. 39-44.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether, in computing its excess profits credit, under Section 435 of the Internal Revenue Code of 1939, taxpayer may attribute to the twelve months of the base period year, 1946, more than \$85,000 of non-existent income, by attributing two incomes to the month of September and to the month of December, and by increasing the actual income of each of the other months of the year.

STATUTES AND REGULATIONS INVOLVED

These may be found in the Appendix, *infra*.

STATEMENT

The Tax Court found the facts as stipulated. (R. 24-29, 33.) They may be summarized as follows:

Taxpayer is a California corporation incorporated on May 19, 1937. (R. 24.) On September 20, 1946, it became a wholly owned subsidiary of Henry J. Kaiser Company and continued as such until December 18, 1946, on which day Henry J. Kaiser Company ceased to own 95 per cent of taxpayer's voting stock. (R. 25.)

Henry J. Kaiser Company was the common parent of an affiliated group of corporations which filed a

consolidated return for the taxable year of the common parent which ended June 30, 1947. Taxpayer's income for the period it was a wholly owned subsidiary, i.e., September 21, 1946, through December 18, 1946, was included in the consolidated return of the affiliated group of corporations. (R. 25.) In a letter to the Commissioner dated April 10, 1947, taxpayer asked for a ruling as to the proper method of reporting its income for the portion of 1946 during which it was not a member of the affiliated group, stating that it desired to maintain its calendar year basis for reporting income and was concerned as to whether it would be required to adopt the fiscal year period of Kaiser. (R. 26, 27-29, 33-34.) Taxpayer was advised that it would not be required to change its accounting period to conform to that of Kaiser unless it was filing a consolidated return with Kaiser for the next year. The Commissioner also advised that taxpayer would be required to file a separate return for each period during 1946 when it was not a member of the affiliated group. (R. 17-20, 34.) Taxpayer filed separate returns for the periods January 1, 1946, to September 20, 1946, and December 19, 1946, to December 31, 1946. (R. 26, 34.)

Taxpayer's excess profits net income for the periods indicated was as follows (R. 26-27, 34):

January 1 to September 20, 1946.....	\$68,174.60
September 21 to December 18, 1946....	78,512.90
December 19 to December 31, 1946.....	(7,131.61)

Taxpayer filed and was allowed a claim for a refund of a portion of the income taxes paid by it for the January 1 to September 20 period, based upon a carry-

back of the December 19 to December 31 operating loss of \$7,131.61. (R. 26, 34.)

Taxpayer's books were not closed to reflect income for any of those fractional periods. They were closed only once for the entire year 1946, showing a profit of \$139,791.09, which was credited to surplus. (R. 27, 34-35.)

The sum of \$139,791.09, minus a statutory loss adjustment of \$3.33, or \$139,787.76, was determined by the Commissioner in his notice of deficiency to be taxpayer's excess profits net income for the twelve months of 1946. (R. 13, 35.) Using this amount plus amounts, here undisputed, for other months of the base period years, the Commissioner determined deficiencies in excess profits tax liabilities for the taxable years as follows (R. 25, 32) :

1950	-----	\$1,043.52
1951	-----	9,791.02
1952	-----	7,089.25

As taxpayer's brief states (p. 9), there is no dispute as to taxpayer's excess profits net income for the years 1947 through 1949, nor is there any dispute with respect to the amount for 1946 if the Commissioner's theory, upon which his computation is based, is correct.

Taxpayer contends that its total excess profits net income for the 12 months of the year 1946 is \$226,590.62. (R. 30-31, Br. 7.) The Tax Court sustained the Commissioner.

SUMMARY OF ARGUMENT

The Korean War excess profits tax was designed to tax a portion of the excessive or unusual profits of the wartime boom years. The amount of excessive profits is determined, under the method applicable here, by a comparison of a taxpayer's income during the taxable years, 1950 to 1952, with its income during the base period years, 1946 to 1949. The income for the earlier years, with certain adjustments, forms the basis for the excess profits credit to be applied in the later taxable years.

At issue here is taxpayer's contention that under the terms of the statute it is entitled, in computing its credit for the years 1950 to 1952, to attribute to the twelve months of the base period year, 1946, more than \$85,000 of non-existent income.

This contention is directly contrary to the purpose and intent of the statute, and to the entire system for determining the excess profits credit. Taxpayer does not, indeed, dispute this, but relies on its reading of the literal language of the statute.

That language, however, far from leading clearly and inevitably to the absurd result which taxpayer claims, is, as the court below pointed out, completely inapplicable to taxpayer's situation. The specific sentence of Section 435(d) of the Internal Revenue Code of 1939 on which taxpayer relies, not only is not intended to apply, but its literal language shows that it does not authorize a computation of the income for a month as if that full month fell within two taxable years.

Alternatively, the Commissioner argued that a literal reading of the statute, applying the statutory

definition of "Taxable year," would result in an excess profits net income of zero for the months during which taxpayer formed a part of the affiliated group for which a consolidated return was filed. Accordingly, if the language of the statute is to be construed in disregard of its purposes, taxpayer's excess profits credit is even less than that forming the basis of the deficiency notices. The Tax Court rejected both taxpayer's argument on the main, and, necessarily, the Commissioner's argument on this alternative. If this Court should disagree with the Tax Court, the case should be remanded for a redetermination on the basis of the alternative.

ARGUMENT

I

Taxpayer's Contention Is Contrary To The Intent And Purpose Of The Statutory Provision

The excess profits tax is designed to siphon off a portion of the unusual or excessive profits made by corporations in wartime booms, in this case the Korean War, regardless of whether the profits are directly related to war production. The tax is imposed upon the adjusted excess profits net income. This is derived from the excess profits net income, which in turn is derived from the normal tax net income, with certain adjustments. From the excess profits net income is subtracted the taxpayer's excess profits credit, to arrive at the adjusted excess profits net income. In dispute here is the amount of the credit to which taxpayer is entitled.

In general a corporation may choose whichever of two methods of computing the credit will give it the

greater credit. One method is based on taxpayer's income during the base period years 1946-1949; the other allows as a credit designated rates of return on the corporation's invested capital. It is the former method which is being used here.

Under Section 435(a) of the Internal Revenue Code of 1939 (*infra*) the excess profits credit is the sum of 85 per cent of the average base period income plus adjustments for additions to capital or reductions therein (not here involved). For use in 1951 and 1952 this percentage was reduced to 84 per cent and 83 per cent respectively (R. 13; Section 602 of the Revenue Act of 1951, c. 521, 65 Stat. 452). The base period is the years 1946 through 1949. In general¹ the average base period net income is determined by computing the excess profits net income for each month in the base period, eliminating the poorest consecutive twelve months, and dividing the aggregate of the other 36 months by three.

In determining the excess profits net income for the base period years the statute permits numerous adjustments for abnormalities, nonperiodic income, and other items which if included would distort those years as a norm. It also contains provisions for the situation where the taxpayer corporation was not in existence during any or all of those years, or has acquired corporations which were separate entities during those years. (Sections 445-447, 461-464, 474.) It also contains special relief provisions for particular industries. (Sections 450, 453, and 459.) None of

¹ This is a very general description intended merely to introduce the main outline. The following discussion of the detailed provisions will show some qualifications.

those complications are, however, involved in the present case.

The general purpose and intent of Section 435 is clear. As set out in the House Committee Report (H. Rep. No. 3142, 81st Cong., 2d Sess., p. 5 (1951-1 Cum. Bull. 187, 190)):

For taxpayers on a calendar-year basis the base period under the bill is the 4-year interval 1946 to 1949. As a general rule taxpayers are permitted to eliminate one of the base-period years. The normal tax net income of the remaining years is then adjusted in a manner described below and averaged. The resulting average base period net income is then reduced by 15 percent for the purposes of the credit.

Under the World War II law the base period was 1936 to 1939, and the credit was 95 percent of the average earnings in this period. It was necessary to substitute the period 1946 to 1949 for the 1936 to 1939 base in this bill both because of the large number of businesses which have been started recently and because of the substantial changes which have occurred in the businesses in existence between 1936 and 1939. The period 1946 to 1949 is the only recent 4-year, nonwar period available. However, it is a period of unusual business prosperity which to a substantial degree was built on the deferred demands, the accumulated savings of World War II, and large postwar defense expenditures. Since this unprecedented level of business activity could hardly have been expected to continue permanently, the use of the income of the years 1946 through 1949, without adjustment, would produce a general overstatement of the taxpayers' earning capacity in the absence of hostilities in

Korea or a large program of military expenditures. For this reason your committee believes that a 15-percent cut-back in average base period income is a moderate adjustment.

To the same effect see S. Rep. No. 2679, 81st Cong., 2d Sess., pp. 5-6 (1951-1 Cum. Bull. 240, 243).

H. Rep. No. 3142 also stated (p. 14) (1951-1 Cum. Bull., p. 196) :

The equitable calculation of excess profits by a comparison between a base-period experience and the income of the taxable year requires the removal of abnormalities not only from the income of the taxable year but from the income of the base period as well.

And see S. Rep. No. 2679, p. 15 (1951-1 Cum. Bull. 250).

For convenience at this point we quote the relevant provisions of Section 435, with the provisions here in dispute italicized.

SEC. 435 [as added by Sec. 101, Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137]. *EXCESS PROFITS CREDIT—BASED ON INCOME.*

(a) [as amended by Sec. 602, Revenue Act of 1951, c. 521, 65 Stat. 452] *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic corporations.*—In the case of a domestic corporation the sum of—

(A) 83 per centum of the average period net income.

(B) if the average base period net income of the taxpayer is the amount determined under subsection (d) of this

section or under section 442, 12 per centum of the amount of the base period capital addition, computed under subsection (f), and

(C) 12 per centum of the net capital addition (as defined in subsection (g) (1)) for the taxable year,

minus 12 per centum of the net capital reduction (as defined in subsection (g) (2)) for the taxable year.

* * * *

(b) *Base Period*.—As used in this subchapter the term “base period” means the period beginning January 1, 1946, and ending December 31, 1949, except that in the case of a taxpayer whose first taxable year under this subchapter was preceded by a taxable year which ended after December 31, 1949, and before April 1, 1950, and which began before January 1, 1950, the term “base period” means the period of 48 consecutive months ending with the close of such preceding taxable year.

* * * *

(d) *Average Base Period Net Income—General Average*.—The average base period net income determined under this subsection shall be determined as follows:

(1) *By computing the excess profits net income for each month in the base period. The excess profits net income for any month during any part of which the taxpayer was in existence shall be the excess profits net income for the taxable year in which such month falls divided by the number of full calendar months in such year, but in no case shall the excess profits net income for any*

month be less than zero. The excess profits net income for any month during no part of which the taxpayer was in existence shall be zero.

(2) By eliminating from the base period whichever of the following twelve months results in the higher average base period net income—

(A) The twelve consecutive months the elimination of which produces the highest average base period net income, or

(B) The twelve months which remain after retaining in the base period the thirty-six consecutive months which produce the highest average base period net income.

(3) By computing the aggregate of the excess profits net income for each of the thirty-six months remaining in the base period.

(4) By dividing by 3 the amount ascertained under paragraph (3).

* * * *

And see Section 40.435-1 of Treasury Regulations 130 (Appendix, *infra*).

It is relevant to note exactly how taxpayer contends that its excess profits net income for the months in 1946 should be computed. Claiming that the italicized provision is applicable to it, it has taken the entire excess profits net income for the period January 1 to September, divided it by eight, and multiplied by nine. (Br. 7.) It has taken the income for the period September 21 to December 18, divided by two, and multiplied by four. It has then subtracted the loss for

December 18 to December 31, making a total claimed for the 12 months of \$226,590.62.

Taxpayer, therefore, has attributed to September two full monthly incomes, one from the preceding period, and one from the succeeding period. Similarly, it has attributed to December two monthly income, one from the preceding period, and one for the partial December period. The method used by taxpayer not only inflates the income of the partial months, but also inflates the income of the full months in the period. For the period September 21 to December 18 the total excess profits net income is \$78,512.90. Presumably some of that income was earned in the partial months of September and December. Nevertheless, by dividing the total by two and attributing the result to each of the full months as well as to each of the partial months, taxpayer arrives at total income for October and November alone of \$78,512.90. It is at least questionable whether the statute authorizes attribution of income in this way to the full months as well as to a partial month.

It is clear that taxpayer's attempt to attribute two incomes to September and to December is, as the Tax Court held (R. 37), an expansion of the twelve months of 1946 into fourteen months and is unreasonable. Taxpayer concedes (Br. 10) that its computation has led to the "unusual situation" of its having a greater credit than it would have had if its actual income for the twelve months of the calendar year 1946 had been used.

This is not only unusual; it is directly contrary to the entire policy and purpose of the statute. Taxpayer would compute its excess profits credit for the

taxable years by including in the base period year 1946 more than \$85,000 of admittedly nonexistent income. The use of the base period income as a guide to the determination of what profits are normal and what are excessive during the Korean War years then becomes meaningless. Even if the language of the statute lent support to taxpayer's contention the Tax Court could properly refuse to apply it to the facts of this case where the result is so absurd.

II

The Language Of Section 435(d) Of The Internal Revenue Code Of 1939 Does Not Warrant The Construction, For Which Taxpayer Contends, And Which Would Result In The Use Of An Exaggerated And Grossly Artificial Income For The Base Period Year 1946

Taxpayer's books were closed only once during the entire year 1946; they were not closed to reflect income for any of the fractional periods. They showed a profit of \$139,791.09, which, minus a statutory loss adjustment of \$3.33, or \$139,878.76, was determined by the Commissioner to be taxpayer's excess profits net income for the twelve months of 1946. (R. 33-34.) Again, the total excess profits net income reported by and for taxpayer on the three separate returns, comprehending its 1946 income—(by reason of inclusion of the period between September 21 and December 18 in Kaiser's consolidated return) did not differ materially from the aggregate profit shown on its books for the calendar year and which formed the basis of the Commissioner's determination. Thus taxpayer's excess profits net income for the three periods indicated was as follows (R. 34):

January 1 to September 20, 1946.....	\$68,174.60
September 21 to December 18, 1946.....	78,512.90
(Included in Kaiser's consolidated return)	
December 19 to December 31, 1946.....	(7,131.61)

Section 435(d) (1) for the purpose of ascertaining the average base period net income requires that the excess profits net income for each month in the base period be computed. The purpose of this provision is, among others, to afford the facts needed for applying the formula contained in Section 435(d) (2). The latter authorizes the elimination of those twelve consecutive months from the forty-eight month base period, which will leave the thirty-six months producing the highest average base period net income. The accomplishment of this computation often may require elimination of part of a given year, i.e., some months of a year included in the base period. Hence, it becomes necessary to ascertain the net income for each month in the base period.²

In other words, the primary purpose of Section 435(d) was to state a formula which would enable the taxpayer to select as its base period the thirty-six months of most favorable income. On the other hand, Congress showed no intention of exaggerating the true and actual income of the base period or to expand any year into fourteen months or to count the income of the same month twice. Had such an extraordinary intention on the part of the legislature existed, cer-

² For illustrative computations, see Prentice-Hall, Federal Excess Profits Tax (under Sections 430-474 of the Internal Revenue Code of 1939) (1954), pars. 45,439 to 45,441, pp. 45,445-45,450.

tainly the Committee Reports would have expressed it. But they afford no such indication whatsoever. The reflection of actual income is what Congress sought. Indeed, it was carefully provided that where for any month included in the base period a taxpayer was during no part of that month in existence, the excess profits net income for that month should be zero. For example, a taxpayer which had not been in existence during one or more of the base period years might, nevertheless, find advantageous the use of the excess proceeds credit based on income by reason of the provision for capital additions in the base period. Section 435(f).

Again, as pointed out by the Tax Court (R. 36), a taxpayer might be in existence for only a part of the beginning month of one of its taxable years and Section 435(d)(1) would afford some slight relief in such a situation. But there is no occasion here to compute this taxpayer's excess profits income for any month in 1946 during a part of which it was in existence and during a part of which it was not in existence, since there was no such month. This taxpayer was in existence both before January 1, 1946, and after December 31, 1949; both during and after each short tax period in the calendar year 1946 and during all of every one of the twelve months in the calendar year 1946.

In any event the essential purpose of the entire computation is to find the actual normal income of the business during the base years so as to compare it with its income during the excess profits tax years. But the duplication of years and of months in the base period, for which taxpayer contends, contravenes

this plain Congressional intent of computing the actual and normal income of the base period years. Thus, all agree here that the true income of taxpayer for 1946 was approximately \$140,000; Congress certainly never intended the language upon which taxpayer relies to warrant it in using the entirely fictitious income of \$226,000, an increase of approximately \$86,000 or about sixty per cent over the actual base period income for 1946. The Tax Court surely was correct in refusing to sanction such an extraordinary contention. (R. 37.)

In these circumstances the classic statement of Mr. Justice Holmes, speaking for the First Circuit in *Johnson v. United States*, 163 Fed. 30, 32, is pertinent:

The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

Equally apt here are two quotations from Judge Learned Hand, who said, in *Federal Deposit Corp. v. Tremaine*, 133 F. 2d 827, 830 (C.A. 2d):

There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of oversolicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it.

and, in *Cabell v. Markham*, 148 F. 2d 737, 739 (C.A. 2d), affirmed, 326 U.S. 404:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

The rules enunciated have often been confirmed by the decisions of the Supreme Court, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457, and *United States v. Amer. Trucking Ass'ns.*, 310 U.S. 534. The construction here sought is in harmony with the scheme of the statute in establishing the excess profits credit and must be read as part of all the provisions establishing the excess profits credit and in the light of the Congressional purpose in establishing the excess profits credit and its place in the consistent plan of the excess profits tax.³

Although under the terms of Section 435(d) the excess profits net income is to be determined for each month,²⁰ that a taxpayer may exclude its poorest con-

³ On the other hand in *Crooks v. Harrelson*, 282 U.S. 55, and *Lewyt Corp. v. Commissioner*, 349 U.S. 237, the pattern of the statutes involved was different and did not call for the Court looking beyond the literal words of a single phrase to the purpose of the Act and the scheme of the tax as a whole.

secutive twelve months or include its best consecutive thirty-six months, the starting point is the base period year, and the conclusion is a figure reflecting twelve months' income. That Congress was thinking in terms of years is indicated by its explanation of the proviso that "in no case shall the excess profits net income for any month be less than zero" as being a provision for "Counting deficit years as zero years." S. Rep. No. 2679, 81st Cong., 2d Sess., p. 6 (1951-1 Cum. Bull. 240, 243). From the excess profits net income of each taxable year is to be computed the excess profits net income for each month in the base period.

Taxpayer would go further, however, to say that the income should be computed for "each fraction of a month". (Br. 13.) The language of the section, however, does not so provide, and its intent prohibits such an interpolation. The sentence in question refers only to months and makes no provision whatever for computation of the income of partial months falling within the taxable year, with the sole exception of the case of a taxpayer beginning its existence during a month.

The language is plain. The excess profits net income for "any month" during any part "of which" the taxpayer was in existence shall be the excess profits net income for "the taxable year" in which "such month" falls divided by the number of full calendar months in "such year," but in no case shall the excess profits net income for "any month" be less than zero. The statute is drafted in terms of months, not of fractional months.

The only reference to a part of a month is in the phrase, "during any part of which the taxpayer was

in existence.” As the Tax Court points out (R. 36), this phrase is intended to take care of the situation where the taxpayer comes into existence during the beginning month of the taxable year. If the taxpayer is not in existence, the following sentence takes care of that situation; if the taxpayer is in existence for the entire month, this language is unnecessary. This taxpayer was in existence during all the months of the base period years.

The language of the sentence, then, with that limited exception, is in terms of full months, rather than partial months, in the taxable years. Furthermore, in its reference to “the taxable year” and “such year,” it is in terms of “any month” falling in only one taxable year.

It is submitted that the Tax Court correctly held that there is no authority for any such unreasonable computation as that for which taxpayer contends.

III

Alternatively, If This Court Disagrees With The Tax Court, The Case Should Be Remanded For Computation Of The Excess Profits Credit By The Method Proposed In The Amended Answer

It is our view that the decision below is correct. This Point III is to be considered only if this Court disagrees with the decision of the Tax Court.

By an amended answer (R. 21-23) in the Tax Court the Commissioner contended in the alternative that under as literal a reading of the statute as taxpayer urges, there would be increased deficiencies due. As presented to the Tax Court, the argument is that there were but two taxable years in 1946 during

which taxpayer had a separate existence. These would be the period prior to its affiliation and the period subsequent thereto. During the period that taxpayer was part of the consolidated group it had, for tax purposes, no separate existence of its own.

All that occurred was that during that period, its earnings became part of the earnings of its parent, who reported such earnings in its taxable and fiscal year ended June 30, 1947. But under Section 48(a) of the Internal Revenue Code of 1939, a fractional part of a year is a "Taxable year" only if a return is made for such period. Here, no return was filed either by taxpayer or by its parent for the fractional part of the year 1946. Accordingly, taxpayer had—taxwise—no existence for that period.

Section 435(d)(1) specifies that—

The excess profits net income for any month during no part of which the taxpayer was in existence shall be zero.

Applying this sentence here, taxpayer's excess profits net income for 1946 would be reduced below that of 1947, and the twelve months of the latter year would be substituted for those of 1946 to make up the thirty-six months of the base period years. Taxpayer's excess profits credit would be reduced, and the increased deficiencies claimed in the amended answer should be sustained.

The Tax Court, not agreeing to the method of statutory construction contended for by taxpayer and approving the Commissioner's determination necessarily rejected the Commissioner's alternative computation. (R. 37.) If this Court should disagree with

the Tax Court we respectfully urge that the case be remanded for computation of the excess profits credit by the method proposed in the amended answer.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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April, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 434 [as added by Sec. 101, Excess Profits Tax Act of 1950, c. 1199, 64th Stat. 1137].
EXCESS PROFITS CREDIT—ALLOWANCE.

(a) *Domestic Corporations.*—In the case of a domestic corporation, the excess profits credit for any taxable year shall be an amount computed under section 435 or section 436, whichever amount results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed.

* * * *

(26 U.S.C. 1952 ed., Sec. 434.)

SEC. 435 [as added by Sec. 101, Excess Profits Tax Act of 1950, *supra*]. EXCESS PROFITS CREDIT—BASED ON INCOME.

(a) [as amended by Sec. 602, Revenue Act of 1951, c. 521, 65 Stat. 452] *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section shall be—

(1) *Domestic corporations.*—In the case of a domestic corporation the sum of—

(A) 83 per centum of the average base period net income.

(B) if the average base period net income of the taxpayer is the amount determined under subsection (d) of this section or under section 442, 12 per centum of the amount of the base period capital addition, computed under subsection (f), and

(C) 12 per centum of the net capital addition (as defined in subsection (g)(1)) for the taxable year,
minus 12 per centum of the net capital reduction (as defined in subsection (g)(2)) for the taxable year.

* * * *

(b) *Base Period*.—As used in this subchapter the term “base period” means the period beginning January 1, 1946, and ending December 31, 1949, except that in the case of a taxpayer whose first taxable year under this subchapter was preceded by a taxable year which ended after December 31, 1949, and before April 1, 1950, and which began before January 1, 1950, the term “base period” means the period of 48 consecutive months ending with the close of such preceding taxable year.

* * * *

(d) *Average Base Period Net Income—General Average*.—The average base period net income determined under this subsection shall be determined as follows:

(1) By computing the excess profits net income for each month in the base period. The excess profits net income for any month during any part of which the taxpayer was in existence shall be the excess profits net income for the taxable year in which such month falls divided by the number of full calendar months in such year, but in no case shall the excess profits net income for any month be less than zero. The excess profits net income for any month during no part of which the taxpayer was in existence shall be zero.

(2) By eliminating from the base period whichever of the following twelve months results in the higher average base period net income—

(A) The twelve consecutive months the elimination of which produces the highest average base period net income, or

(B) The twelve months which remain after retaining in the base period the thirty-six consecutive months which produce the highest average base period net income.

(3) By computing the aggregate of the excess profits net income for each of the thirty-six months remaining in the base period.

(4) By dividing by 3 the amount ascertained under paragraph (3).

* * * *

(26 U.S.C. 1952 ed., Sec. 435.)

Treasury Regulations 130, as promulgated under the Internal Revenue Code of 1939:

Sec. 40.435-1. *Excess profits credit based on income—Determination of average base period net income—*(a) *Introductory.* In order for a corporation to determine for any particular taxable year the amount of its excess profits credit based on income, it is necessary first to compute the amount of the average base period net income, * * *

(b) *Base period.* The term “base period” means the period beginning January 1, 1946, and ending December 31, 1949, * * *

* * * *

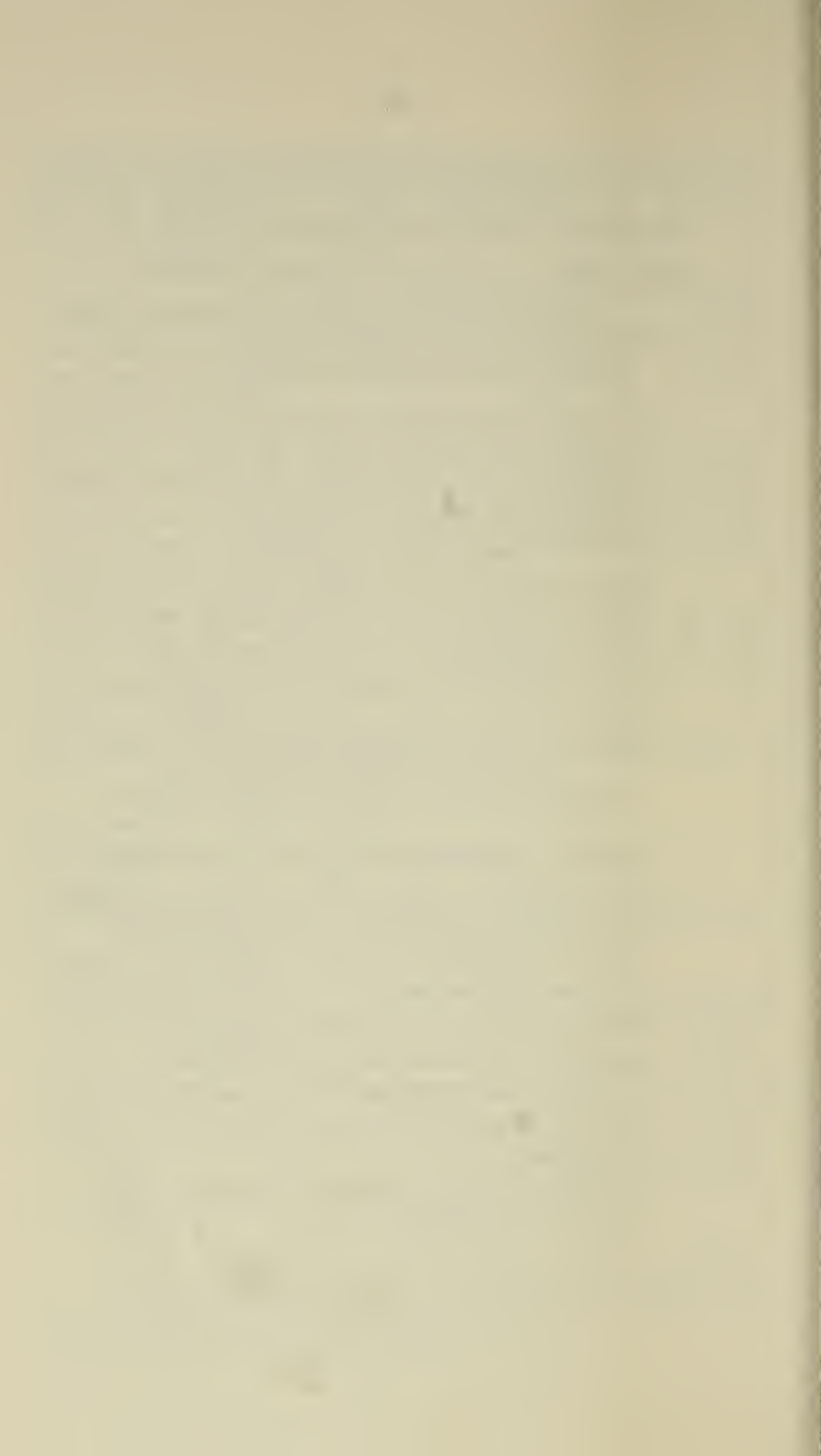
(d) *Computation under general average method.* The following steps are required for the computation of the average base period net income under the general average method:

(1) The excess profits net income is determined for each month during which the taxpayer was in existence during the base period. This amount is determined for any month during any part of which the taxpayer was in existence by dividing the excess profits net income (computed in accordance with the provisions of section 433(b)) for the taxable year in which such month falls by the number of full calendar months in such taxable year. In no case shall the excess profits net income for any month be less than zero. The excess profits net income for any month during no part of which the taxpayer was in existence shall be zero.

(2) The 36 months which produce the highest aggregate excess profits net income are selected under either of two methods; (i) the 12 consecutive months having the lowest aggregate excess profits net income may be eliminated; or (ii) the 36 consecutive months having the highest aggregate excess profits net income may be retained.

(3) The excess profits net income for each of the 36 months selected under (2) is aggregated.

(4) The aggregate amount computed under (3) is divided by 3.



No. 15787

In the

United States Court of Appeals

For the Ninth Circuit

UNDERWRITERS SERVICE, INC., a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitioner's Opening Brief

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I.

JURISDICTIONAL STATEMENT

This is a petition to review the decision entered in the above-entitled proceedings by The Tax Court of the United States on May 17, 1957, which ordered and decided that there were deficiencies in the income and excess profits tax of Petitioner for its taxable years 1950, 1951 and 1952 (R. 38). On August 14, 1957, Petitioner filed a petition for review (R. 39-44).

The jurisdiction of The Tax Court of the United States is based upon Section 7442 of the Internal Revenue Code of 1954 (26 U.S.C.A., Section 7442), and the controversy is to be determined under the Internal Revenue Code of 1939, as amended by the Excess Profits Tax Act of 1950.

As Petitioner made its Income and Excess Profits Tax Returns for the calendar years 1950 and 1951 with the Collector of Internal Revenue for the First District of California, at San Francisco, California, and for the calendar year 1952 with the District Director of Internal Revenue, at San Francisco, California, the jurisdiction to review the decision of The Tax Court of the United States is conferred upon this Court by Section 7482 of the Internal Revenue Code of 1954 (26 U.S.C.A., Section 7482).

The Tax Court of the United States filed a written opinion in these proceedings on May 13, 1957 (R. 32-37).

II.

STATEMENT OF THE CASE

A. Questions Involved and Manner in Which Raised.

1. Whether or not the second sentence of Section 435(d) (1) of the Internal Revenue Code of 1939 is applicable to the facts of this case, as hereinafter set forth, and if so, whether the aggregate excess profits tax net income for the twelve months in 1946 is \$226,590.62. This question has been raised by The Tax Court of the United States summarily holding, contrary to either the position of the Petitioner or the apparent assumption of the Respondent, that said provision has no application to this case.

2. Whether or not each of the periods for which a separate or consolidated income tax return was filed returning Petitioner's income for the calendar year 1946 constituted a "taxable year" as that term is used in Section 435(d)(1) of the Internal Revenue Code of 1939, as amended, and as said term is defined in Section 48(a) of the 1939 Code. This question has been raised by the Petitioner, and by the failure of The Tax Court of the United States to so hold.

3. Whether or not the excess profits tax net income of Petitioner for each month during the calendar year 1946,

by the application of said Section 435(d)(1), is to be computed by dividing the excess profits tax net income for each of its taxable years by the number of full calendar months in each such period and assigning the resulting amount to each full month and each fractional month in each such period. This question has been raised in the same manner as that mentioned at paragraph 2 hereinabove.

4. Whether or not The Tax Court of the United States properly ignored the principles of statutory construction applicable to tax statutes, which principles require and support the computations of the excess profits net income made by petitioner for the twelve months of 1946. This question has been raised by The Tax Court of the United States holding contrary to such principles of statutory construction that the computations of Petitioner were unreasonable and without authority in law.

B. Statement of the Facts.

This case arose out of a controversy between the Petitioner and Respondent with respect to the computation of the Petitioner's excess profits tax credit under the income method for the calendar years 1950 through 1952. More specifically, it involves the proper method of computing the excess profits net income of Petitioner for each of the months in the calendar year 1946, one of the base period years to be used in the determination of such credit. It is the contention of the Petitioner that its excess profits net income for each of the months in 1946 is to be computed in accordance with Section 435(d)(1) of the Internal Revenue Code of 1939, as amended by the Excess Profits Act of 1950, and that such section cannot be ignored in making this computation.

Apparently assuming that Section 435(d)(1) was to be applied, although not in accordance with the specific lan-

guage found therein, Respondent asserted deficiencies in the Petitioner's excess profits taxes for the calendar years 1950 through 1952, which, as set forth in the Respondent's statutory notice to Petitioner, were as follows:

1950.....	\$1,043.52
1951.....	9,791.02
1952.....	7,089.25

The Tax Court of the United States concluded that the Commissioner's determination, as set forth in said statutory notice, was correct. (R. 35).

In an amended answer filed by Respondent in the proceedings before The Tax Court of the United States (R. 21-24), Respondent asserted increased deficiencies in the Petitioner's excess profits taxes for the calendar years 1950 through 1952 to the following amounts:

1950.....	\$ 1,467.62
1951.....	10,622.42
1952.....	7,910.76

The increased deficiencies asserted by the Respondent were rejected as incorrect by The Tax Court of the United States (R. 37).

The facts relating to this controversy were stipulated by a written stipulation (R. 24-27), and by two exhibits filed as part of an oral stipulation (R. 30-31) at the time of the hearing on this matter before The Tax Court on August 27, 1956, and were so found by The Tax Court. The situation thereby presented is as follows:

The Petitioner, a California corporation duly incorporated on May 19, 1937 and having its principal office in San Francisco, California (R. 24), became a wholly-owned subsidiary of Henry J. Kaiser Company on September 20, 1946, and continued as such until December 18, 1946. On

that day, Henry J. Kaiser Company ceased to own 95% of the voting stock of Petitioner (R. 25).

Knowing that an affiliated group of corporations, of which Henry J. Kaiser Company was the common parent and the Petitioner was a member, would file a consolidated income tax return for the taxable year of Henry J. Kaiser Company ending June 30, 1947, the Petitioner's representative, in a letter dated April 10, 1947, requested a ruling from the Bureau of Internal Revenue with respect to two problems created by such proposed filing (R. 27-29). In response to this request, the Bureau of Internal Revenue issued a ruling, dated April 18, 1947, that, with respect to the first such problem, the Petitioner would not be required to change its accounting period to conform to that of Henry J. Kaiser Company unless the Petitioner filed or was required to file a consolidated return with the aforementioned affiliated group for the subsequent taxable year (R. 18).

The other problem upon which a ruling was requested by Petitioner concerned the proper method of reporting the Petitioner's income for the portion of the calendar year 1946 during which Petitioner was not a member of the aforementioned affiliated group (R. 29). In answer to this problem, the Bureau of Internal Revenue ruled, in the same letter dated April 18, 1947, that the Petitioner would be required to file a separate income tax return for each of the two periods in 1946 during which it was not a member of the affiliated group. This ruling was stated as follows:

"It is held that the foregoing provisions of the regulations require in the case of the facts presented with respect to your corporation that a separate return be filed for each period during the calendar year 1946 in which your corporation was not a member of the affiliated group. Accordingly, one separate income tax return should be filed for the period January 1, 1946, to

September 20, 1946, and another return should be filed for the period December 19, 1946, to December 31, 1946. Each period of less than 12 months for which either a separate or consolidated return is filed, under the provisions of section 23.13, shall be considered as a taxable year. (Section 23.31(g) of Regulations 104.)" (R. 19).

The income of Petitioner for the period September 21, 1946, through December 18, 1946, was then included in the consolidated income tax return filed by the affiliated group, of which Henry J. Kaiser Company was the common parent, for the fiscal year ended June 30, 1947 (R. 26). The Petitioner's excess profits net income for this period was \$78,512.90, of which \$79,012.90 was included in that consolidated return (R. 26-27). (A \$500 charitable deduction was not allowable on the consolidated return.)

Pursuant to the above-mentioned ruling of the Bureau of Internal Revenue, the Petitioner filed a separate income tax return for the period January 1, 1946 through September 20, 1946, and one for the period December 19, 1946 through December 31, 1946. The excess profits net income of the Petitioner returned for the first such period was \$68,174.60, and it sustained a net operating loss in the amount of \$7,131.61 for the second such period. The Petitioner also filed a claim for refund of a portion of the income taxes paid by it for the period January 1, 1946 through September 20, 1946 based on the carry-back of such net operating loss, which claim was allowed (R. 26).

Because of having three taxable periods in the calendar year 1946 for which income tax returns were required to be filed, the Petitioner deemed it obligatory to apply the language of Section 435(d)(1) of the Internal Revenue Code of 1939 in computing its excess profits tax credit for the years 1950 through 1952, and particularly to consider each of said three taxable periods as a "taxable year" under said

Section 435(d)(1). Accordingly, the Petitioner computed an aggregate excess profits tax net income of \$226,590.62 for the twelve months in the base period year of 1946, as shown in the schedule filed as part of the oral stipulation before The Tax Court (R. 31) and set forth as follows:

1	2	3	4	5	6
Taxable year	Excess profits net income for taxable year	Number of full months in taxable year	Excess profits net income for each month or part of a month	Number of full and part months in period	Column 4 times Column 5
1/1/46 to 9/20/46	\$68,174.60	8	\$ 8,521.83	9	\$ 76,696.43
9/21/46 to 12/18/46	78,512.90	2	39,256.45	4	157,025.80
12/18/46 to 12/31/46	(7,131.61)	0	(7,131.61)	1	(7,131.61)
Total excess profits net income for the 12 months of the year 1946.....					<u><u>\$226,590.62</u></u>

(EX. 5-E)

This aggregate amount was computed by dividing the income for each of the three taxable periods mentioned above by the number of full months in each such period and then assigning the resulting amount to each full month and each fractional month within such period. These amounts so assigned were then aggregated to determine the excess profits tax net income for each of the months in such calendar year.

The Respondent, however, refused to accept this obvious interpretation of the language of Section 435(d)(1), and, instead, determined that the Petitioner's excess profits tax net income for the twelve months in 1946 could not exceed the amount of the actual excess profits net income of \$139,791.09 (minus a statutory loss adjustment of \$3.33, or \$139,787.76) earned and credited to surplus by the Petitioner (R. 27).

The effect of this determination by the Respondent led to the deficiencies asserted against the Petitioner for the tax years involved in this controversy.

III.

SPECIFICATION OF ERRORS

The Petitioner specifies the following as errors of The Tax Court of the United States upon which it relies on this appeal:

1. Failure to conclude as a matter of law that the Commissioner has incorrectly determined the excess profits net income of Petitioner for the 12 months of 1946;

2. Failure to conclude as a matter of law that the second sentence of Section 435(d)(1) of the Internal Revenue Code of 1939 is applicable to the facts as stipulated in this case;

3. Failure to conclude as a matter of law that each of the periods for which a separate or consolidated income tax return was filed returning Petitioner's income for the calendar year 1946 is a taxable year within the definition of the term "taxable year" in Section 48(a) of the Internal Revenue Code of 1939, the Respondent's Regulations issued pursuant thereto and Respondent's Rulings pertaining thereto;

4. Failure to conclude as a matter of law that, according to the clear terms of Section 435(d)(1) of the Internal Revenue Code of 1939, the excess profits tax net income of Petitioner for each month during the calendar year 1946 is arrived at by dividing the excess profits tax net income for each of the taxable years by the number of full calendar months in such period;

5. Failure to conclude as a matter of law that Petitioner correctly computed its excess profits net income under Section 435(d)(1) of the Internal Revenue Code of 1939 for the 12 months of 1946 in the amount of \$226,590.62;

6. Failure to conclude as a matter of law that the principles of statutory construction with respect to tax statutes compel it to render a decree in favor of Petitioner and against Respondent.

IV.

ARGUMENT**A. Analysis of the Controversy and General Discussion.**

As indicated by the discussion under "Statement of the Case", the facts involved in this controversy were submitted to The Tax Court of the United States on stipulations of fact and there is therefore no apparent disagreement between the parties in this matter with respect thereto. In addition, there is no question that, for the computation of the Petitioner's excess profits tax credit based on income for the tax years here involved, the Petitioner's base period consists of the four calendar years 1946 through 1949, inclusive. There is also no dispute between the parties with respect to the excess profits net income of the Petitioner for the base period years 1947 through 1949, nor is there any dispute with respect to the amount of the Petitioner's excess profits net income for the year 1946 as set forth in the statutory notice, provided the theory of the Respondent, under which this figure was computed, is upheld by this Court.

The sole issue in this case revolves around Section 435(d)(1) of the Internal Revenue Code of 1939. Specifically, the question is whether or not this section is to be applied in making the computation to determine the excess profits net income of Petitioner for the twelve months in the calendar year 1946 and, if so, how this computation is to be made. The sole issue is purely and simply a matter of law, upon which there is no decision of any court.

Taking the position that not only can Section 435(d)(1) be applied, but that it must be applied, in the circumstances of this case, the Petitioner, in accordance with the clear terms of this section, computed its excess profits net income for the twelve months in 1946 in the amount of \$226,590.62. The Commissioner insisted, however, on reading into this

section terms which are *not* found therein and reading out of it terms which *are* found therein. He then determined that the amount of actual excess profits net income earned in 1946 by the Petitioner in the amount of \$139,791.09 must also be the figure used in computing the Petitioner's excess profits tax credit based on income for the years 1950 through 1952. While the Respondent at least attempted to apply Section 435(d)(1) in making his determination, although doing great violence to the terms thereof, The Tax Court of the United States arbitrarily, and without any legal basis therefor, held that the mathematical formula set out in the second sentence of this section had no application to this case.

Apparently these positions have been taken by both the Respondent and The Tax Court of the United States because the unusual situation of the Petitioner in having three taxable years during the calendar year 1946 has led to the unusual situation of the Petitioner having a greater excess profits tax credit under Section 435(d)(1) than it would have had if its actual income for the twelve months of the calendar year 1946 had been used. It would seem that unusual situations leading to what might perhaps be called an unexpected result under tax statutes, being no novelty, should not result in controversies of this nature. As will be demonstrated in the following discussion of specific aspects of this controversy, this case is not so unusual, nor is the language of Section 435(d)(1) so ambiguous, that the Respondent and The Tax Court of the United States should be sustained in their refusal to apply and give effect to Section 435(d)(1) and to long established principles of taxation.

B. The Applicability of Section 435(d)(1) of the Internal Revenue Code of 1939.

Section 435 of the Internal Revenue Code of 1939, as amended by the Excess Profits Tax Act of 1950, reads, in part, as follows:

“SEC. 435. EXCESS PROFITS CREDIT—BASED ON INCOME.

“(a) Amount of Excess Profits Credit.—The excess profits credit for any taxable year, computed under this section, shall be—

“(1) Domestic Corporations.—In the case of a domestic corporation the sum of—

“(A) 83 per centum of the average net income.

“(B) If the average base period net income of the taxpayer is the amount determined under subsection (d) of this section or under section 442, 12 per centum of the amount of the base period capital addition, computed under subsection (f), and

“(C) 12 per centum of the net capital addition (as defined in subsection (g)(1) for the taxable year,

minus 12 per centum of the net capital reduction (as defined in subsection (g)(2) for the taxable year.

“(b) Base Period.—As used in this subchapter the term ‘base period’ means the period beginning January 1, 1946, and ending December 31, 1949, except that in the case of a taxpayer whose first taxable year under this subchapter was preceded by a taxable year which ended after December 31, 1949, and before April 1, 1950, and which began before January 1, 1950, the term ‘base period’ means the period of 48 consecutive months ending with the close of such preceding taxable year.

* * * * *

“(d) Average Base Period Net Income.—General Average.—The average base period net income determined under this subsection shall be determined as follows:

“(1) By computing the excess profits net income for each month in the base period. The excess profits net income for any month during any part of which

the taxpayer was in existence shall be the excess profits net income for the taxable year in which such month falls divided by the number of full calendar months in such year, but in no case shall the excess profits net income for any month be less than zero. The excess profits net income for any month during no part of which the taxpayer was in existence shall be zero."

* * * * *

The provisions of the above section with respect to the computation of a taxpayer's excess profits credit are invoked by Section 434 of the Internal Revenue Code of 1939, which reads as follows:

"SEC. 434. EXCESS PROFITS CREDIT—ALLOWANCE.

"(a) Domestic Corporations.—In the case of a domestic corporation, the excess profits credit for any taxable year shall be an amount computed under section 435 or section 436, whichever amount results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed."

Until The Tax Court of the United States handed down its decision in this case on May 17, 1957, the Petitioner assumed (and is still convinced) that Section 435(d)(1) must be applied to the circumstances found in this case, since the clear and specific terms of that section provide the only method for computing the taxpayer's average base period net income for each month during that period. It was also apparent that the Respondent assumed this section was applicable, since, in his argument before The Tax Court, he contended, not that such section was inapplicable, but simply that it was to be applied in a manner other than that used by the Petitioner.

The Tax Court, however, decided that, no matter what the language of Section 435 might be, it should be ignored.

This, of course, resulted in a new area of conflict being introduced into this matter.

While the Respondent's position heretofore taken ignores all principles of statutory construction, as hereinafter discussed, the holding of The Tax Court that Section 435 does not apply amounts to a pure and simple case of judicial legislation. Apparently deciding that Section 435 *should* not apply, The Tax Court has then proceeded to either write that section out of the Internal Revenue Code for this case, or it has rewritten it in order to sustain such a decision. This is easily demonstrated.

It would seem that it is incontrovertible that Section 435 (d)(1) is to be used, by virtue of its specific language, in the determination of the taxpayer's average base period net income. It would also seem clear that this is to be arrived at by computing excess profits net income for each month, and each fraction of a month, in each taxable year in the base period. This is, of course, different than the method used under the Excess Profits Tax Act of World War II, which provided for the computation of excess profits net income on an average *year* rather than months. This latter Act also provided specifically for taxable years of less than twelve months.

It is also quite patent that Congress clearly intended, in enacting Section 435(d)(1), that corporations might, under some circumstances, have a larger excess profits net income than actual income. For example, a corporation organized on November 30, and adopting a calendar year, would have an excess profits tax credit twice as large as its actual income for that period, since the income earned in the month of December would also be attributed to November. The principle is equally applicable here.

Assuming, as we must, that Section 435(d)(1) must be applied to determine a taxpayer's excess profits net income for each month in the base period, how is that income to be

computed? The second sentence of that section provides the answer for all cases where the taxpayer, in a taxable year, had a month during which it was in existence *either* in whole *or* in part. The statutory language is “*any* month during *any* part of which the taxpayer was in existence.” (Emphasis added.) The third sentence answers the question as to the amount of income to be attributed to any month *no* part of which the taxpayer was in existence, which amount is zero. It is as simple as that, with each possibility clearly provided for in the statutory formula. One will look in vain to find any language inferring that, under a particular set of circumstances, the formula is to be ignored.

The Tax Court, however, has completely ignored the above provisions of Section 435(d)(1), contending that such provisions are not applicable here because it feels that the purpose of that section was to cover some other situation not spelled out in the language thereof. The Tax Court, without citing any support, assumes, arbitrarily and incorrectly, that the purpose of that second sentence “is to give some slight relief in a situation where the taxpayer was in existence for only a part of the beginning month of one of its taxable years” (R. 36). It then decides that the Petitioner is not within this arbitrarily assumed purpose because it had no months during 1946 in which it was in fact in existence for a part only, although the language of the statute is not limited to that situation.

Be that as it may, The Tax Court is obligated to construe a statute as it is written, it is not to read it as it feels it should be written, and it is not to ignore it should it feel it should not be applied. If the purpose of Section 435(d)(1) were as contended by The Tax Court, Congress could quite easily have stated such purpose in the following language, which is the apparent language The Tax Court has in this case “judicially legislated”:

“(d) Average Base Period Net Income—General Average.—The average base period net income determined under this sub-section shall be determined as follows:

“(1) By computing the excess profits net income for each *entire* month in the base period *during which the taxpayer was in existence*. The excess profits net income for any month during *only* (delete *any*) part of which the taxpayer was in existence shall be the excess profits net income for the taxable year in which such month falls divided by the number of full calendar months in such year, but in no case shall the excess profits net income for any month be less than zero. The excess profits net income for any month during no part of which the taxpayer was in existence shall be zero.” (Italicized words added.)

It is submitted that the application of Section 435 cannot be avoided by any such attempt to either ignore its clear language or to read into the existing language such words and phrases as were not enacted by Congress but which The Tax Court feels will bring this section of the Internal Revenue Code within an imagined purpose.

C. Each of the Periods for Which Returns Were Filed by Petitioner During the Calendar Year 1946 Was a "Taxable Year".

As has already been indicated, the basic disagreement between the parties in this matter (at least until the above decision of The Tax Court) concerns the meaning to be given the term “taxable year” as found in Section 435(d)(1). This is the crux of the situation here presented, in view of the three taxable periods of the Petitioner in the calendar year 1946 for which a separate or a consolidated return was filed, and assuming, as we must, that Section 435(d)(1) is to be applied. Since this section refers, not to a calendar year or to an accounting period, but specifically to a “taxable

year", the application of such section is meaningless unless effect is given to this phrase. Thus, a determination that the three taxable periods of the Petitioner in 1946 are taxable years within the meaning of section 435(d)(1) must result in a reversal of The Tax Court.

Looking first to the meaning given the term "taxable year" by the Internal Revenue Code, and the applicable regulations thereunder, there should be no reasonable doubt that each of the periods for which a separate or consolidated return was filed by the Petitioner in 1946 was a "taxable year" as that term is used in section 435 (d) (1) of the 1939 Code. Section 48(a) of the 1939 Code is as follows:

"(a) TAXABLE YEAR.—'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. *'Taxable year' means, in the case of a return made for a fractional part of a year under the provisions of this chapter or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made.*" (Emphasis supplied.)

The provisions of the Consolidated Return Regulations 104, in effect for the calendar year 1946, required two separate returns and one consolidated return during the year 1946. Section 23.13(a) of Regs. 104 provides:

"(a) General Rule.

"Except as hereinafter provided, a consolidated return must include the income of the common parent corporation and of each subsidiary for the entire taxable year of the affiliated group."

Clearly under this provision, the income of Petitioner for the period from September 21, 1946 through December 18, 1946 was required to be included in the consolidated return of Henry J. Kaiser Company. Section 23.13(g) of Regs. 104 provides:

“(g) Separate Returns for Periods Not Included in Consolidated Return.

“If a corporation, during its taxable year (determined without regard to the affiliation), becomes a member of an affiliated group, its income for the portion of such taxable year not included in the consolidated return of such group must be included in a separate return (or, if a member of another affiliated group which makes a consolidated return for such period, then in such consolidated return). If a corporation ceases to be a member of the affiliated group during the taxable year of the group, its income for the period after the time when it ceased to be a member of the group must be included in a separate return (or, if it becomes a member of another affiliated group which makes a consolidated return for such period, then in such consolidated return).”

Clearly under this provision of the Respondent's Regulations, the income of the Petitioner for the period January 1, 1946 through September 20, 1946 was required to be included in a separate return and the Petitioner's income for the period December 19, 1946 through December 31, 1946 was required to be included in a separate return.

Not only does this clearly follow under the provisions of the Internal Revenue Code and the Regulations promulgated thereunder but the Respondent has, based on the very facts involved here, ruled that these returns were required and that each period for which a return was required is a taxable year. In its ruling dated April 18, 1947, the Bureau of Internal Revenue stated as follows:

“It is held that the foregoing provisions of the regulations require in the case of the facts presented with respect to your corporation that a separate return be filed for each period during the calendar year 1946 in which your corporation was not a member of the affiliated group. Accordingly, one separate income

tax return should be filed for the period January 1, 1946, to September 20, 1946, and another return should be filed for the period December 19, 1946, to December 31, 1946. *Each period of less than 12 months for which either a separate or consolidated return is filed, under the provisions of section 23.13, shall be considered as a taxable year.* (Section 23.31 (g) of Regulations 104.)” (Emphasis supplied.)

As pointed out earlier, no case (prior to the decision of The Tax Court in this matter) has considered the specific question raised by the circumstances of this case. However, a decision in a number of cases has heretofore turned on the meaning of the term “taxable year” as it applies to fractional years, and, nearly without exception, the Commissioner has taken the position that such term means the period for which a return is made. The circumstances of these cases primarily involved the application of the loss carry-forward or carry-back provisions of the Internal Revenue Code.

For example, the case cited by The Tax Court, as tacit support for its holding that Section 435(d)(1) had no application to this case, *Helvering v. Morgan's, Inc.*, 293 U.S. 121 (1934), held, in determining the extent of a loss carry-over, that the Commissioner was wrong in contending that the term “taxable year” meant the period for which a return was made. The important point, however, is that the then equivalent of Section 48 (a) of the 1939 Code read that the term “taxable year” *includes* a return made for a fractional part of a year. The Commissioner was not upheld, because the Supreme Court of the United States determined that the word “includes” was not an interchangeable equivalent with the word “means”. This was, of course, corrected in the 1942 Revenue Act, Section 135(d),

which amended this section by striking out the word "includes" and inserting in lieu thereof "means".

It is, therefore, quite obvious that, in spite of the language of the Supreme Court concerning accounting periods and calendar years, its decision would have been different had it been faced with construing the meaning of the term "taxable year" as it now stands.

More in point is the case of *Wishnick-Tumpeer, Inc. v. Commissioner*, 77 F.2d 774 (App. D.C. 1935), cert. den. 296 U.S. 628 (1935). Here the taxpayer corporation was on a calendar year accounting basis and its affiliate was on the basis of a fiscal year ending October 31. Upon the parent changing its accounting period in 1929 from the calendar year to a fiscal year ending June 30, the affiliate had to include its income for the period from July 1, 1928 to October 31, 1928 in a separate return for its fiscal year ending October 31, 1928, had to include its income for November and December 1928 in a separate return filed for that fractional period, and had to return its income for the period January 1 to June 30, 1929 on a consolidated return filed with its parent for the fiscal year ending June 30, 1929. Thus the affiliate had three taxable periods within a twelve consecutive month period.

The Commissioner ruled that November and December 1928 was a separate "taxable year" and that, as a result, the loss of the affiliate incurred during its fiscal year 1927 could be offset against income allocated to the "taxable year" consisting of the two months of November and December 1928, but not against income for its "taxable year" from January 1 to January 30, 1929. The taxpayer argued that the term "taxable year" did not mean a fraction of a year, but meant a full twelve month period. The Commissioner, however, was upheld by the Circuit Court of Appeals, because a regulation of the Commissioner, not in effect at

the time of the decision in *Helvering v. Morgan's, Inc.*, *supra*, provided that "any period of less than twelve months for which either a separate or consolidated return was filed shall be a taxable year."

Finally, it should be noted that this construction of the term "taxable year" has already operated to the detriment of the Petitioner by reason of the circumstances in this case. During its taxable year December 19, 1946 through December 31, 1946, Petitioner suffered a loss in the amount of \$7,131.61. Pursuant to the provisions of Section 122 of the Internal Revenue Code of 1939, this net operating loss was a net operating loss carry-back first to the second preceding year. Because the taxable period September 21, 1946 through December 18, 1946 was a taxable year, the second preceding taxable year was the period January 1, 1946 through September 20, 1946. The taxpayer filed a claim for refund based on this carry-back and was refunded taxes based on such claim. The effective tax rate for the period was 38%. Had the taxable period September 21, 1946 through December 18, 1946 not been a taxable year, the loss would have been carried back to the calendar year 1945, an excess profits tax year, and the recovery would have been at a tax rate of 95%. Having suffered the detriments of the application of these principles of law, Petitioner is most certainly entitled to the benefits thereof.

By reason of the above discussion, the conclusion seems inescapable that each of the three periods covered by income tax returns in 1946 of the Petitioner were taxable years as that term is used in Section 435(d)(1) of the 1939 Code. To hold otherwise would appear to be an extreme example of loose statutory interpretation and an arbitrary disregard of statutory definitions.

D. The Effect of Application of Section 435(d)(1).

The result of having had three taxable years within the calendar year 1946 is that Section 435(d)(1) of the Internal Revenue Code must be applied to determine the excess profits tax net income of the Petitioner for each of the twelve months in that calendar year. Section 435(d) provides in part as follows:

“(d) AVERAGE BASE PERIOD NET INCOME—GENERAL AVERAGE.—The average base period net income determined under this subsection shall be determined as follows:

“(1) By computing the excess profits net income for each month in the base period. The excess profits net income for any month during any part of which the taxpayer was in existence shall be the excess profits net income for the taxable year in which such month falls divided by the number of full calendar months in such year, but in no case shall the excess profits net income for any month be less than zero. The excess profits net income for any month during no part of which the taxpayer was in existence shall be zero.”

The application of this provision to the facts of this case is purely mathematical. The section clearly provides that the income of a taxable year is to be divided by the number of full months in such taxable year and that the result of that computation is the excess profits tax net income for each month during such year during any part of which the taxpayer was in existence. Applying this section to Petitioner's situation, there should first be divided by eight Petitioner's excess profits tax net income for the period January 1, 1946 through September 20, 1946. The result of this division is assigned to each month during any part of which the taxpayer was in existence during that period. Similarly, Petitioner's excess profits tax net income for the

taxable year September 21, 1946 through December 18, 1946 in the amount of \$78,512.90 should be divided by two and the result of that division should be assigned to each of the four months during which the taxpayer was in existence.

The result of these computations, as shown on page 7, may be summarized as follows:

<u>1/1/46 to 8/31/46</u>	<u>9/1/46 to 9/30/46</u>	<u>10/1/46 to 11/31/46</u>	<u>12/1/46 to 12/31/46</u>
\$68,174.60	\$ 8,521.83	\$78,512.90	\$32,124.84
	39,256.45		

The total for such twelve consecutive months is \$226,590.62.

The above computation has been categorized by The Tax Court of the United States as “unreasonable” because, so says The Tax Court, the Petitioner “has by this method expanded the 12 months of 1946 into 14 months and has computed excess profits net income for ‘taxable years’ rather than for months” (R. 37).

A simple answer to this contention is, first, that, as this Court will note from Exhibit 5-E, Column 5 thereof (R. 31), the Petitioner did not use two extra months but used only ten full months and four part months, following strictly the dictates of Section 435(d)(1). It would seem apparent that there were three taxable periods, one of which involved one fractional month, one of which involved two fractional months, and a third which involved one fractional month. Thus, there were four fractional months and ten full months, aggregating a period of twelve full months.

Secondly, the Petitioner has not made its computations for “taxable years” rather than for months, but, again as dictated by Section 435(d)(1), has computed its excess profits net income for each full month, and each fractional month, comprising each of its three “taxable years” in the calendar year 1946. The Petitioner does not wish to belabor the point, but it seems too clear for argument that Section

435(d)(1) requires that the computation be made in this manner.

E. The Principles of Statutory Construction Applicable to Tax Statutes Compel a Decision Upholding the Petitioner.

In the final analysis, the decision in this matter rests upon whether settled principles of statutory construction applicable to tax statutes are to be followed or whether by ignoring such principles settled rules are to be thrown into hopeless confusion. Is a taxpayer, already confused by the many vague and ambiguous sections of our Internal Revenue Code, to be told that he must ignore a clear statutory mandate, thereby having his confusion compounded, or is he to be upheld in faithfully following and applying such mandate? That is the principle involved in this matter.

There have been many decisions handed down by every level of our judicial system which afford clear and conclusive support to the importance of construing tax statutes as they are written by Congress. For example, in *United States v. Merriam*, 263 U.S. 179, 187-188 (1923), the Supreme Court of the United States, in language still quoted in this connection, stated:

“On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. *Gould v. Gould*, 245 U.S. 151, 153. The rule is stated by Lord Cairns in *Partington v. Attorney-General*, L.R., 4 H.L. 100, 122:

“I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.’ And see *Eidman v. Martinez*, 184 U.S. 578, 583.”

In *United States v. Olympic Radio & Television, Inc.*, 349 U.S. 232 (1955), the Supreme Court of the United States had to determine whether or not the phrase “paid or accrued” in Section 122(d)(6) of the Internal Revenue Code of 1939 was to be given the same meaning under that section as was provided in Section 48. The taxpayer, on the accrual basis, contended that in computing its net operating loss for carry-back purposes, it could deduct the amount of excess profits which were paid in that loss year but which had accrued in an earlier year. In holding against the taxpayer, the Supreme Court recognized that this would discriminate against an accrual basis taxpayer and favor a cash basis taxpayer. It insisted, however, on construing the language of the Internal Revenue Code as written, and stated, page 236:

“The Court of Claims recognized the force of this analysis, but concluded that Congress could not have meant what it said because, if so, this particular carry-back provision would have little application. First, most corporations are on the accrual not the cash basis.

Second, if an accrual taxpayer is limited in its deductions to excess profits taxes accrued within the taxable year, the provision has little value since there is 'rarely a case when a taxpayer would be liable for any excess profits tax in a year in which it had sustained a net operating loss * * *.' 124 Ct. Cl., at 37, 108 F. Supp., at 111. This taxpayer argues the inequity of the results which would follow from our construction of the Code. But as we have said before, 'general equitable considerations' do not control the question of what deductions are permissible. *Deputy v. du Pont, supra*, at 493. It may be that Congress granted less than some thought or less than was originally intended. We can only take the Code as we find it and give it as great an internal symmetry and consistency as its words permit. We would not be faithful to the statutory scheme, as revealed by the words employed, if we gave 'paid or accrued' a different meaning for the purposes of § 122(d)(6) than it has in the other parts of the same chapter.

"Our construction is in harmony with the general rule that a taxpayer on an accrual basis must take deductions in the year of accrual. See *Security Mills Co. v. Commissioner*, 321 U.S. 281.

"The fact that the construction we feel compelled to make favors the taxpayer on the cash basis and discriminates against the taxpayer on the accrual basis may suggest that changes in the law are desirable. But if they are to be made, Congress must make them."

Demonstrating that an insistence upon a uniform construction of tax statutes cuts both ways, the Supreme Court of the United States, in *Lewyt Corporation v. Commissioner*, 349 U.S. 237 (1955), upheld a contention of a taxpayer that the excess profits taxes that could be offset against net income in a particular taxable year should be the amount of such taxes reported for that year rather than the amount of excess profits taxes ultimately found to be due. While this

resulted in the taxpayer, in effect, realizing a double benefit (since the amount ultimately found to be due was substantially less than the amount shown on its return), the Supreme Court stated, pp. 239-240:

"The controversy turns on the meaning of the clause in § 122(d)(6) which reads, 'the amount of tax imposed by Subchapter E of Chapter 2 * * * accrued within the taxable year * * *.' The Commissioner contends that the tax 'imposed' is the tax ultimately determined to be due. The argument is that the taxpayer having once got back, through credit or refund, the difference between the amount of the tax 'accrued' in 1944 and the amount finally determined to be due, no double benefit should be inferred. The double benefit, it is argued, should certainly be denied when the figure upon which it is based has no economic reality.

"But the rule that general equitable considerations do not control the measure of deductions or tax benefits cuts both ways. It is as applicable to the Government as to the taxpayer. Congress may be strict or lavish in its allowance of deductions or tax benefits. The formula it writes may be arbitrary and harsh in its applications. But where the benefit claimed by the taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the taxpayer though they represent an unexpected windfall. See *Bullen v. Wisconsin*, 240 U.S. 625, 630."

The *Lewyt Corporation* case, *supra*, was cited by the Court of Appeals for the Tenth Circuit in *Diamond A Cattle Co. v. Commissioner*, 233 F.2d 739 (10th Cir. 1956), where it upheld the right of a corporate taxpayer to carry-back an artificially created loss realized by reason of the liquidation and transfer of all of its assets prior to the realization of income from its seasonal business of selling cattle. This loss was attributable to the portion of the year in which the taxpayer

operated. The taxpayer admitted that this loss factor was one of the reasons for liquidating at the time it did, but that the language of Sections 122(b)(1) and 710(c)(3)(A) of the 1939 Code (relating, respectively, to net operating loss carry-backs and excess profits credit) were clear and unambiguous. The Court of Appeals quoted from the *Lewyt Corporation* case, *supra*, with respect to the taxpayer receiving an unexpected windfall, and, in this connection, stated, page 742:

“It is certainly true that this Petitioner has taken the maximum advantage of this situation taxwise, and this was probably a situation never contemplated by Congress * * * When Congress passes an Act in language that is clear and unambiguous and construed and read in itself can mean but one thing the Act must be judged by what Congress did and not by what it intended to do.”

With respect to the action of The Tax Court in the instant case in choosing to ignore the clear provisions of Section 435(d)(1), the case of *Dravo Corp. v. United States*, 138 F. Supp. 274 (Ct. Cl. 1956), is particularly appropriate. Under Section 710(c)(3)(A) of the 1939 Code, it is provided that a taxpayer “shall” carry back any unused excess profits credit in determining its excess profits tax liability. By applying that section strictly, the total tax liability of the taxpayer in that case was substantially increased by reason of the fact that it lost the 10% postwar credit granted on excess profits taxes. It was clear that this credit was intended by Congress to be a relief provision, but the Respondent, of course, argued that the language of Section 710(c)(3)(A) had to be strictly applied.

The Court of Claims was sympathetic to the taxpayer, since it recognized that the application of such section would benefit all taxpayers except those in the situation of the

taxpayer. It stated that Congress, if aware of this particular situation, might have changed the section to permit an election by the taxpayer. The Court, however, felt obliged to sustain the Commissioner and enforce the specific terms of the statute, by stating, p. 276:

“We cannot grant more relief than the application of the appropriate sections allow *without ignoring the plain language of Section 710(c)(3)(A).*” [Emphasis added.]

Finally, some mention should be made of the two cases cited by The Tax Court in its decision as authority for the proposition that the Petitioner's contention in this case is without merit. These two cases, *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) and *United States v. American Trucking Associations, Inc.*, 310 U.S. 534 (1940), were not concerned, in the first place, with tax statutes. The first of these cases concerned a statute prohibiting the importation and migration of foreigners and aliens under a contract to perform labor. The Supreme Court, of course, held that this statute should not be applied to a contract between a religious society and an alien employed by it to be its minister of the gospel.

In the second of these cases, the Supreme Court was concerned with the construction of the Motor Carrier Act of 1935 and felt justified in limiting the meaning of the word “employees” used in that statute by reason of a rather voluminous legislative history showing that the intended scope of this word was to be so limited. It should be noted, however, that four of the nine justices dissented and adopted the opinion of the United States District Court as their opinion. *United States v. American Trucking Associations, Inc.*, 31 F. Supp. 35 (D.C. D.C. 1939). The language employed by the District Court on page 39, which was so adopted, is particularly appropriate to the situation found in this case:

“In the view we take, the language of the disputed section is so plain as to permit only one interpretation, and we can find nothing in the Act as a whole which can with any assurance be said to lead to a different result. The circumstances under which the section was placed in the bill may possibly have created a situation not contemplated by its sponsors, but to say that this is true would be pure speculation, in which we have no right to indulge and upon which we can base no conclusion.”

It is quite apparent that the circumstances in those two cases were quite different from the circumstances in the instant case. The answer to these cases can best be found in the following language of the Supreme Court of the United States in *Crooks v. Harrelson*, 282 U.S. 55, 59-60, 61 (1930), which is perhaps the most often quoted case for the proposition that tax statutes must be construed literally, and which refused to apply the principle of the *Holy Trinity Church* case:

“It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle sought to be applied is that followed by this court in *Holy Trinity Church v. United States*, 143 U.S. 457; but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. Compare *Pirie v. Chicago Title and Trust Company*, 182 U.S. 438, 451-452. And there must be something to make plain the intent of Congress that the

letter of the statute is not to prevail. *Treat v. White*, 181 U.S. 264, 268.

“Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. *Monson v. Chester*, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. (Cases cited.)

* * * * *

“Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness.”

The importance and necessity of construing tax statutes literally, whenever the words employed therein are not ambiguous or undefined, cannot be stated in clearer or more expressive terms than those quoted above from our highest courts. The Excess Profits Tax Act of 1950 has been described as the most technical taxing statute ever enacted, but that should not mean that its clearly worded, although technical, provisions and terms should be ignored in an obvious attempt to provide judicially what one may feel has been legislatively overlooked. Certainly the argu-

ment being made by the Petitioner in this case is not so absurd or "so gross as to shock the general moral or common sense."

V.

CONCLUSION

The basic issue in this case is simply a question of law, the solution of which is dictated by the following considered and sound conclusions:

A. Since it is clear that a taxpayer's excess profits net income for its base period necessitates a computation of such income for each month, and each fractional month, in such base period, the second sentence of Section 435(d)(1) of the Internal Revenue Code of 1939 must be applied in order to make such computation.

B. Because the term "taxable year", as contained in said Section 435(d)(1), so clearly means each period for which either a separate or consolidated return is filed, the Petitioner necessarily had three taxable years during the calendar year 1946.

C. The purely mathematical computation then required under Section 435(d)(1) clearly results, as demonstrated by Exhibit 5-E (herein set forth on page 7), in an excess profits net income for the twelve months of 1946 in the amount of \$226,590.62.

D. The principles of statutory construction applicable to tax statutes require that Section 435(d)(1) not be ignored, that it be strictly applied to the facts as stipulated in this case, and that each and every term contained therein be given the meaning its plain language imports and as it has been defined.

For the foregoing reasons it is respectfully submitted that the decision of The Tax Court of the United States should be reversed and that the Respondent's determination

that there are deficiencies in the excess profits taxes of the Petitioner for the calendar years 1950, 1951 and 1952 be held to be in error.

Dated: San Francisco, California, March 19, 1958.

Respectfully submitted,

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